Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

RUDOLPH W. GIULIANI,
as the Mayor of the City of New York, et al.,

Petitioners,

-against-

HAROLD YOURMAN, et al., etc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is a challenge by employees of local governments to their employers' view that they are exempt from the provisions of the federal Fair Labor Standards Act ("FLSA") because they are executive or administrative employees, 29 U.S.C. section 213(a)(1). The employees argue that they do not satisfy the "salary basis test" for exemption set forth in regulations of the Department of Labor ("DOL"), 29 C.F.R. section 541.118.

1. Is the window of correction provision of the salary basis test, 29 C.F.R. section 541.118(a)(6), in accordance with the plain language of the regulation, available to a local government employer that has clarified its policies to further insure compliance with the test, and has promised to comply in the future and to repay any deductions which are found to be inconsistent with the test, or is the window of correction provision only available to a local government employer that, in addition, had neither policies that created a significant likelihood of pay deductions inconsistent with the test, nor an actual practice of such pay deductions.

2. Is the DOL's application of the salary basis test to local government employees violative of the tenth amendment, because it is the result of a failure of the national political process, or if not should the salary basis test be interpreted to avoid a conflict between the FLSA and the tenth amendment?

PARTIES TO THE PROCEEDING

Petitioners are Rudolph W. Giuliani, Mayor of the City of New York; The Board of Education of the City School District of the City of New York; and the New York City Health and Hospitals Corporation, a separately incorporated public benefit corporation. There are over 430 respondents; each is a natural individual. They are: Yvette Wynne, Mary White, Ellen Wilson, Phyllis Williams, Harriet Williams, Ethel Wells, Mary Walton, Eduardo Vidal, Antonio Turrigiano, Esther Turnbull, Norman Trosten, Karl Trachte, Notre Thomas, N. Lael Telfeyan, Kathryn Tate, Deborah Taitt, Elbert Sweat, Sharon K. Summerville, Arlene Stringer, Charles Sternberg, Rea Stein, Neila Spence-Reid, Stephen Smith, Patrick Smith, Patricia Smith, Mary Shower, Michael Shady, Joseph Sepulveda, Florence Schulman, Joanne Schoonmaker, Barbara Schoen, Lenore Schlossberg, Raymond Saes, Herbert Rosenblum, Louis Romasco, Philip Rigaud, Camille Ranieri, Joyce Prever, Rhoda Poblet, Peter Peta, Arnold Pessin, June Nearon, Marilyn Mungen, Lucy Mueller, Robert Moss, Beverly Moran, Marilyn Moch, Irving Mittenberg, John Milioti, Yvonne Mccoy, Roberta Mcbride, Harriet Mannheim, Gerald Maguire, Carol Lyttle, Martin Levine, Michael Lessinger, Inez Lambert, Lawrence Konstan, John Kelly, Marcha Kellam, Anita Kasen, Yvonne Jones, William Jones, Laura Jones, Barbara Howard, Katherine Holley, Morris Heney, Lillian Heard, Thomas Hargrove, Mattie Harris, Jeanette Greaves, Robin Goodstein, David Goldstein, John Gargano, Joan Frimmer, Linda Freeman, Raymond Frasene, Anita Folkerth, Gloria Ferreras, Stephen Ferrer, William Ferrante, Richard Fenton, Evelyn Felix, Anne Eskridge, Eileen Erickson, Edward Ellis, Stuart Eber, Peter Early, William Dworkin, Marcella Doswell, Joseph Donini, Rickey Dennis, Dennis Deering, Elizabeth Daversa, Anthony Curry, Anthony Curcio, Dominick Cucinotta, Juanita Copes, Nereida Cintron, Carmen Ceriobelle, Sharyn Brown, Brenda Brown, Christene Brock, Sandra Bounty, Louis Bongiovi, Martin Bokser, Elaine Blumpkin, Anita Bloom, Thelma Blash,

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PETITION FOR WRIT OF CERTIORARI TO THE
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CITATIONS BELOW

The opinion and order from which Petitioners seek certiorari is reported at 229 F.3d 124 (2d Cir., 2000) and appears in the appendix at A-1. The October 7, 1999 memorandum and order of the United States District Court for the Southern District of New York is not reported, but appears at 1999 U.S. Dist. LEXIS 15700 and in the appendix at A-19. The District Court's opinion and order followed vacatur and remand of this matter by this Court in Giuliani v. Yourman, reported at 519 U.S. 1145 (1997). The preceding opinion of the United States Court of Appeals for the Second Circuit is reported at 84 F.3d 655

(2d Cir., 1996) and appears in the appendix at A-58. The original order and opinion of the District Court is reported at 826 F.Supp. 736 (S.D.N.Y., 1993) and appears in the appendix at A-63. Another opinion of the District Court is reported at 865 F.Supp. 154 (S.D.N.Y., 1994), but it addresses no issues relevant to this petition.

JURISDICTION

The Court of Appeals' order was issued October 2, 2000. There was no petition for rehearing. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The following provisions, which are cited in this petition, appear in the Appendix at pages 108 through 113: U.S. Const., Amdt. X; Fair Labor Standards Act, 29 U.S.C. §§207 and 213; 29 C.F.R. §§541.1, 541.2, 541.3, 541.5d, and 541.118.

STATEMENT OF THE CASE

Respondents are over 430 managers employed by petitioners in various agencies of the City of New York, or in one of two local government entities, the Board of Education of the City of New York and the New York City Health and Hospitals Corporation ("petitioners"). As managers, respondents have been classified by petitioners as exempt from the overtime provisions of the FLSA, pursuant to 29 U.S.C. section 213(a)(1), commonly called "the white collar exemption." Among the terms of respondents' contracts of employment is the requirement that they work a minimum of thirty-five hours each week and as many additional hours as are necessary to discharge their responsibilities (A-65). However, there is some flexibility for these managers to vary their work hours to compensate for unusually long hours previously worked (A-65-66). Respondents also accrue, each year, between

20 and 27 days of paid annual leave and 12 days of paid sick leave, and there is also provision for discretionary advancement of leave time if leave balances are exhausted (A-66-67). They are paid salaries and fringe benefits but no overtime. Respondents sued claiming that petitioners' policies on, inter alia, disciplinary sanctions, are not consistent with the salary basis test and therefore respondents are not exempt employees under the DOL regulations. See 29 C.F.R. section 541.118(a)(2)-(5). Respondents do not claim that their duties are not those of exempt employees. See 29 C.F.R. sections 541.1(a)-(e), 541.2(a)-(d). Assuming that the complaint states a claim upon which relief may be granted, the District Court had jurisdiction under 28 U.S.C. section 1331 and 29 U.S.C. section 216(b).

As managers, many respondents are among the higher-paid employees in the municipal work force. In large part because of these high annual salaries (which produce a high hourly rate), when damages were calculated in the first round of this litigation, for the four-and-one-half year liability period, and statutory liquidated damages were then added, approximately one hundred respondents had damages awards of between $10,000 and $50,000, approximately fifty-five respondents had damages awards of between $50,000 and $100,000, approximately thirty-five respondents had damages awards between $100,000 and $200,000, and five respondents had damages awards exceeding $200,000 (JA 29-55).[1] The total damages exceeded $13.3 million (JA 28). While this is a very large award, it covers only one of seven similar cases pending in the District Court against one or more petitioners, brought

[1] Citations to the Joint Appendix are designated "(JA__)", citations to the two Exhibit Volumes to the Joint Appendix are designated "(E__)", and citations to the Sealed and Confidential Volume of the Joint Appendix are designated "(CA__)".

by over 5,000 other employees, including two other cases brought by managers who did not join this case.

History of this Litigation: In 1993, the District Court ruled that because there was a theoretical possibility that respondents' salaries could be docked in ways inconsistent with the salary basis regulations at 29 C.F.R. §541.118(a), the respondents' salaries were "subject to reduction" and the respondents were therefore not exempt from the overtime requirements of 29 U.S.C. §207(a)(1) (A-78-84). The Second Circuit affirmed on the District Court's opinion (A-58-62). This Court then vacated the judgment and remanded in light of Auer v. Robbins, 519 U.S. 452 (1997). Giuliani v. Yourman, 519 U.S. 1145 (1997).

On remand, the parties essentially cross-moved for summary judgment. Applying Auer, the District Court held, inter alia, that petitioners' disciplinary policies did not create a "significant likelihood" of deductions, and were therefore in conformity with the salary basis regulations (A-32-35). The District Court then examined the petitioners' practices. It was undisputed that petitioners Board of Education and Health and Hospitals Corporation should each be treated as a separate entity for purposes of the actual practice analysis (A-28). The government of the City of New York, which is the largest municipal employer in the nation (E 323), is divided into forty-eight agencies, which in the aggregate employed 3,734 managers. The District Court found that responsibility for imposing discipline is vested, as a matter of both statute (the New York City Charter) and practice, in the head of each City agency, and that some City agencies had issued their own codes of conduct and/or disciplinary manuals and policies, and accordingly, determined that it was necessary to analyze discipline on an agency-by-agency basis (A-28-32)(CA 63-64, 66-67, E 746). The record showed that of the forty-eight City agencies, more than three-quarters had imposed no disciplinary deductions on any of their managers (CA 4-7). The managers who are respondents in

Yourman had been employed in fifteen of these agencies; the District Court found no disciplinary deductions by ten of the Yourman agencies. In four agencies there was one impermissible deduction and in one agency there were two impermissible deductions, one of which was imposed under unusual circumstances (A-39-47). The District Court further found that there was one impermissible disciplinary deduction by the Board of Education and four such deductions by the Health and Hospitals Corporation. The Board of Education employed 454 managers and the Health and Hospitals Corporation employed 3,708 managers (A-47-49). The Court concluded that petitioners did not have an actual practice of imposing disciplinary deductions (A-38-49).

The District Court then concluded that since the disciplinary deductions were made for reasons other than lack of work, and petitioners had clarified their policies to mirror the FLSA exemption standards, promised to comply in the future, and promised to reimburse any manager who was found to have been docked in a manner inconsistent with the salary basis test, petitioners could utilize the window of correction provision of the regulation, 29 C.F.R. §541.118(a)(6), to reimburse the few managers whose salaries had been docked, and thereby preserve the exemption (A-53-55). Although the District Court noted that under Auer, it was an "open question" whether the window of correction could be utilized if there were a pattern of improper deductions, or a policy of making improper deductions, the Court held it was unnecessary to resolve the issue because there was no such pattern or policy in this case (A-53-55). Accordingly, the District Court granted summary judgment to petitioners (A-55).

The Court of Appeals vacated the judgment and remanded to the District Court for further proceedings (A-3). After oral argument, the Court of Appeals requested that the United States Department of Labor ("DOL") submit an amicus brief on five specific questions, including whether the District Court had properly concluded that the

petitioners could utilize the window of correction. The Court of Appeals accepted most but not all of DOL's interpretations (A-3, 15-17).

The Court of Appeals did affirm the District Court's finding that petitioners did not have disciplinary policies that created a "significant likelihood" of deductions (A-9). However, the Court of Appeals found that in ascertaining whether there was an actual practice of disciplinary deductions, the District Court had improperly used the simple expedient of dividing the number of deductions by the number of managerial employees (quoting the District Court's statement that "out of 3,708 HHC [Health and Hospitals Corporation] managers, four deductions constitute only 0.1%. This is not sufficient to constitute a practice of deductions." (A-11). Second, the District Court had applied the wrong standard in determining whether to use an agency-by-agency analysis and third, the District Court had improperly excluded deductions imposed prior to the statute of limitations period (A-111-12).

On remand the District Court was required to examine numerous factors in determining whether there was an actual practice, including, but not limited to: "the number of times that other forms of discipline are imposed; the number of employee infractions warranting discipline; the existence of policies favoring or disfavoring pay deductions; the process by which sanctions are determined, and the degree of discretion held by the disciplining authority." (A-12-13). These and other relevant factors needed to be ascertained to determine whether the employer's practices reflect an "objective intention" to pay its employees on a salaried basis (A-12). In finding that there might be a question of fact whether an agency-by-agency analysis was appropriate, the Court of Appeals found "most telling" a memorandum that was promulgated by the City Personnel Director to City agencies, which explicitly stated that it was being promulgated in response to the first District Court decision in this case; the memorandum required agencies to follow detailed

guidelines for compliance with that decision (A-15). Ironically, this compliance memorandum was the only instance in which a citywide disciplinary directive had been issued (CA 66-68), it had been issued because of the pressing circumstances created by this litigation, and now the petitioners' compliance effort during the course of this litigation was singled out as the possible basis for a finding that might lead to liability in the case for the period prior to the issuance of the compliance memorandum. The Court of Appeals held that on remand the plaintiffs could offer to show an actual practice of pay deductions by the City or by any relevant City agency (A-17). In addition, the Court of Appeals held that the District Court should consider dockings dating back to April 1986, when the FLSA first became applicable to local government employers, even though the statute of limitations period here commenced in April 1989. (A-17).

Finally, the Court of Appeals held that the window of correction was not available if an employer had a practice of making improper deductions or a policy that effectively communicates that such deductions will be made (A-7-8).

The Court of Appeals decision is the first and only court decision to require evidence and analysis of these numerous factors in ascertaining whether there is an actual practice of disciplinary dockings. The decision fails to consider the enormous difficulties of producing evidence, going back fifteen years, to 1986, from 50 different agencies (the City agencies and the two affiliated local government petitioners), covering almost 8,000 employees, concerning such nebulous phenomena as "the number of employee infractions warranting discipline," which taken together with the mandate to consider all instances of the imposition of discipline, necessarily includes instances where infractions may not have resulted in discipline. If no discipline was imposed, there may never have been documentation concerning the incident. Further, many agencies have disciplinary policies for handling less serious

infractions (that generally result in a reprimand or the loss of one or a few annual leave days), which provide that documentation concerning the discipline is removed from the employee's personnel file after one year, provided no further misconduct is committed (see, e.g., E-421, E-896). Finally, records going back fifteen years may no longer exist, and many persons who were involved in the decisionmaking are no longer in petitioners' employ.

The history of this litigation and the Court of Appeals' most recent decision are illustrative of the confusion, and conflicting and changing standards, that have pervaded the application of the salary basis test to state and local governments since the FLSA became applicable to these governments in April 1986.

Partial Day Docking: After this Court held that the FLSA constitutionally could be applied to State and local governments, Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528 (1985), DOL received many inquiries from State and local governments about the salary basis test and particularly about the test's provision prohibiting deductions from salary for partial-day absences (as opposed to deductions for absences of a day or more, which are permissible under the salary basis test). 29 C.F.R. section 541.118(a). These inquiries were caused by the fact that the partial-day docking prohibition was in direct conflict with the principle, applicable to virtually all, if not all, State and local governments, of public accountability, which means that public employees must account for all hours for which they are paid and that public employees must not be paid for time spent not working. See generally Service Employees International Union v. County of San Diego, 60 F3d 1346, 1352 & n.2 (9th Cir, 1995); 57 FR 37667.

As early as January 16, 1987, DOL had stated in the Federal Register that it expected to publish a notice of proposed rulemaking concerning 29 C.F.R. Part 541 in 1987. 52 FR 2019. In the interim, DOL responded to the

inquiries by letter rulings, including a January 9, 1987 letter ruling which announced that DOL would follow a nonenforcement policy with respect to partial-day docking, although it noted that employees remained free to claim in lawsuits that their exempt status had been lost because of a salary deduction for part of a day. In that letter ruling DOL expressly recognized that deductions for partial-day absences, were required by the public accountability principle when leave balances had been exhausted and would cause the exemption to be lost because of the prohibition on partial-day docking. DOL stated that the nonenforcement policy would be followed while DOL gave consideration to proposed changes in the salary basis test.

In May of 1987, District Courts began issuing decisions in actions brought by State and local employees on the question of whether the exemption is lost where leave balances are used for partial-day absences and no actual salary deduction takes place (see 865 F. Supp. at 160 [District Court decision herein] and cases cited therein). Not until September 6, 1991, however, did DOL issue an interim final rule providing that docking for partial-day absences, when no accrued leave is available, will not cause an otherwise exempt employee to lose the exemption. 56 FR 45824 (later codified at 29 C.F.R. section 541.5d). In issuing the interim final rule, DOL observed that, despite DOL's nonenforcement policy, diverging judicial interpretations of the salary basis test in lawsuits brought by employees had resulted in enormous exposure to public employers for back overtime wages to employees "some of whom would clearly be exempt if duties and amount of compensation alone were examined." 56 FR 45825. DOL recognized that the potential liability "could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the FLSA." Id. DOL stated that it, id.:

> has been considering (and continues to consider) a variety of possible changes to the regulations

governing the exemptions for bona fide executive, administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

On August 19, 1992, DOL issued a final rule revising section 541.5d in respects not relevant here; DOL had decided that its attempt to make its 1991 rulemaking retroactive was invalid. 57 FR 37666. In its accompanying comments, DOL again recognized that the combination of the public accountability principle and the salary basis test effectively prevented any public employee from falling within the managerial exemption (id. at 37667):

> Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt.

DOL also stated that it is clear that "Congress intended for the section 13(a)(1) exemption to be available for public sector employees. 57 FR at 37672.

Disciplinary Sanctions: The concept underlying the public accountability principle is that public employers are answerable to the taxpayers for their use of public funds, including compensation paid to employees (57 FR 37667). This principle certainly means that public employees are to properly do their work and cannot do little work, improper work or engage in improper activities on the job. In other words, the ability of State and local governments to discipline their employees is as central to the public accountability principle as is their ability to insist that their employees be paid only for time spent working.

In the disciplinary area, this principle is joined by the principle of progressive discipline, which is that the punishment must not be disproportionate to the offense in

light of the employee's disciplinary record. This principle is followed in New York. Pell v. Board of Education, 34 NY2d 222, 234-35, 356 NYS2d 833 (1974); McAvoy v. Ward, 145 AD2d 378, 381, 535 NYS2d 721, 723-24 (1st Dept, 1988), leave to appeal denied, 74 NY2d 606, 544 NYS2d 820 (1989); Hutchinson v. Lloyd, 216 AD2d 3, 627 NYS2d 46 (1st Dept), leave to appeal denied, 86 NY2d 710, 635 NYS2d 947 (1995).

Although in hindsight the conflict between the disciplinary component of the salary basis test, 29 C.F.R. section 541.118(a)(5), on the one hand, and the progressive discipline and public accountability principles, on the other, seems plain, the fact is that after Garcia everyone focussed on the partial-day docking issue and largely overlooked the conflict as to the disciplinary component (see 865 F Supp at 159-60 [District Court opinion herein]). Plaintiffs sued on the partial-day docking component and the District Court rulings were on that issue.

In its promulgation of 29 C.F.R. section 541.5d in 1992, DOL addressed comments it had received about the disciplinary component of the salary basis test. 57 FR 37674. DOL began by noting that disciplinary provisions were not strictly speaking open for comment during that rulemaking but promised to consider this subject again in proposed revisions to Part 541 "at a later date." Id. Among the comments received by DOL were that the public employers have less freedom to terminate employees; that public employers have virtually no other penalty options besides termination; that suspension for a full week is rarely imposed because of its severity; and that the failure to allow disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees. Id.

As noted above, as early as January 16, 1987, DOL had stated in the Federal Register that it expected to publish a notice of proposed rulemaking concerning 29 C.F.R. Part 541 in 1987. 52 FR 2019. However, the only rulemaking

that has been issued, proposed or otherwise, is the interim final rule issued on September 6, 1991, eventually codified at 29 C.F.R. section 541.5d, which addressed only the partial-day docking issue. 56 FR 45824. To this day, DOL has not issued any further proposed changes to the salary basis test, despite DOL's repeated statements that additional rulemaking is needed and appropriate. For example, on November 14, 1994, DOL published its "1994 Regulatory Plan" in the Federal Register. DOL stated of its adoption of 29 C.F.R. section 541.5d in 1991, "These revisions were limited in nature and the regulations are still in need of updating and clarification....[DOL has} conclude[D} that a comprehensive review of these regulations is both necessary and appropriate. The Department intends to solicit input through a public hearing process to identify issues and to develop regulatory proposals." 59 FR 57130. DOL stated further, 59 FR at 57130 (emphasis supplied):

> Because of the limited nature of these revisions [29 C.F.R. §541.5d], the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employment....
>
> Because the regulations are sorely out-of-date, a comprehensive rulemaking is necessary. The Department intends to reopen the comment period of the November 1985 advance notice of proposed rulemaking and to obtain additional information pertaining to matters that have arisen subsequently through a hearing process.
>
> ...Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private

and public sectors. Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations and will eliminate this apprehension.

> In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s and that they do not readily adapt to contemporary government functions.... Resolution of these conflicts over how the regulations are to be applied in the public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable.

Despite this acknowledgment by DOL, six years ago, that the regulations should be revised, to date, no advance notice of proposed rulemaking has been issued by DOL. Childers v. City of Eugene, 922 F. Supp. 403, 410-412 (D.C.Or., 1996), aff'd, 120 F.3d 944 (9th Cir., 1997).

REASONS FOR GRANTING THE PETITION

The issue of the application of the salary basis test to local government is one of extraordinary importance, for two reasons. The first is money. For example, the initial judgment in this case, exclusive of attorneys' fees and costs, exceeded $13.3 million, for approximately 430 employees. However, this case is only one of seven similar cases pending in the District Court against one or more of the petitioners, collectively brought by over 5,000 employees. In Auer, 519 U.S. at 461, this Court stated that it was adopting the standard established there to avoid "the imposition of massive and unanticipated overtime liability including the possibility of substantial liquidated damages..." The windfall nature of the award of overtime

pay, generally doubled pursuant to the liquidated damages provisions of 29 U.S.C. §216(b), to employees who, as supervisors, administrators, managers and/or professionals, are generally among the higher-paid employees in the government workforce, and almost all of whom never experienced a docking of pay, has also been noted. Kuchinskas v. Broward County, 840 F. Supp. 1548, 1557 (S.D.Fla., 1993), aff'd, 86 F.3d 1168 (11th Cir., 1996), cert. denied, 520 U.S. 1182 (1997). Further, these employees willingly accepted their positions pursuant to employment agreements that clearly provided that there would be no overtime compensation. Here, if respondents prevail, many individual respondents will receive windfall awards of tens of thousands dollars and some will receive awards of hundreds of thousands of dollars.

This problem is faced not just by the City of New York and its affiliated local government entities, but by local governments all across the country. Since this Court decided Auer, less than four years ago, LEXIS indicates that there have been approximately 26 federal Court of Appeals decisions that, wholly or in part, concerned whether local government employers had satisfied the salary basis test. As enormous as the potential financial burden appears to be for petitioners, in this and the six other pending cases, the financial burden may in fact be greatest on smaller entities, such as towns, villages, small cities and rural counties, that do not have the financial reserves to respond in damages if virtually every employee previously thought exempt suddenly were entitled to years of back overtime.

Putting aside the question of back overtime, the salary basis test, as applied herein, leaves local governments between the Scylla and Charbdis of making virtually all of their previously-exempt employees hourly employees and of revising their policies to mirror the salary basis test. Making all of their managers hourly employees would be costly; the petitioners estimated, in this lawsuit, that if they were to make all of their managers hourly

employees and if each manager worked two hours of overtime each week, the annual cost to petitioners would have been 60 million dollars in 1991. This is a lot of money, even to the nation's largest city, and would loom even larger if the current economic downturn were to deepen, as many experts anticipate.

This financial burden would be all the more unnecessary because it is undisputed that Congress intended that the white collar exemption would be available to state and local governments. The 1974 amendments to the FLSA, by which Congress extended the FLSA to all state and local governments, made no change in the white collar exemption. In addition, the Senate committee report refers to the 1974 amendments as extending the FLSA to "five million non-supervisory employees in the public sector," S Rep No 93-690 at 22, and the House committee report states that "virtually all non-supervisory employees" in the public sector will be covered, HR Rep No 93-313, reprinted in 1974 USCCAN (2d Sess) at 2837 (quoted at 57 FR 37667); see also 1974 USCCAN (2d Sess) at 2833, 2838; Service Employees International Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1351 (9th Cir. 1995); Mercado v. Commonwealth of Puerto Rico, 214 F.3d 34, 43 (1st Cir. 2000). In short, there is no question that Congress intended that supervisors employed by State and local governments would come within the white collar exemption. DOL admits this. 57 FR 37672. Respondents do not dispute it. No Court has ever suggested otherwise.

The alternative of revising policies to satisfy the salary basis test is no better. Petitioners did clarify their policies for managerial employees after the District Court's initial ruling on liability in 1993, to conform to that ruling. As clarified, these policies provide that disciplinary sanctions that would involve a loss of salary, such as a fine or suspension without pay, may not be imposed. The policies also prohibit the docking of accrued leave (E 157-164), because the District Court had initially noted that the docking of leave may be an impermissible docking of

compensation, in light of petitioners' policies allowing managers to "cash out" portions of unused accrued leave when they leave government service (A-67). This left termination and demotion as the only remaining meaningful penalties; these are very severe penalties and petitioners are loath to impose them unless they believe that the infraction is equally serious and the Courts will not overturn imposition of these penalties under the progressive discipline principle. Under these policies petitioners' ability to deter less than very serious infractions is greatly hampered. In addition, a failure by petitioners to take appropriate corrective action, such as imposing an appropriate disciplinary sanction on a wrongdoer, can be the basis for a lawsuit against petitioners under statutes such as Title VII of the Civil Rights Act of 1964. 42 U.S.C. section 2000-e et seq. Indeed, such claims have been asserted in suits brought against petitioners under Title VII and other statutes.

Since the initial District Court ruling in 1993, various administrative and judicial rulings have made it clear that docking of accrued leave as a disciplinary penalty is consistent with the salary basis test, even for employers, such as petitioners, who allow employees to "cash out" unused accrued leave (A-52), and that suspensions without pay in full workweek increments are also consistent with the salary basis test (A-45-46). However, while this lessens the impediments to a flexible and appropriate progressive disciplinary system, it does not eliminate them. Further, these developments are just one more example of the rampant and continuing confusion that has existed in the implementation of the salary basis test in the state and local government sector ever since 1986.

The salary basis test has accordingly been mired in continuing confusion since 1986, when it first became applicable to state and local governments. DOL has itself acknowledged the inappropriate and outmoded nature of the salary basis test provisions, but has nevertheless failed to revise the regulations despite repeated promises to do so.

The courts, as well as DOL, have imposed changing and conflicting standards, as to what policies and practices are consistent with the salary basis test. Accordingly, it is both imperative and appropriate that the window of correction provision be available to state and local government employers to correct actions found to be inconsistent with the salary basis test, and thereby avoid massive liability.

The Window of Correction Should Be Available

In Auer v. Robbins, 519 U.S. 452 (1997), this Court resolved one conflict among the circuits concerning the window of correction provision of the salary basis regulation, 29 C.F.R. § 541.118(a)(6). Auer held that although the deduction at issue there was not inadvertent, "the plain language of the regulation sets out 'inadvertence' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." Id. at 463.

An important question undecided by Auer was whether the window of correction was available to an employer who was found to have an actual practice of docking pay. There have been conflicting determinations on this issue by the Circuit courts, both before and after Auer.

Following Auer, several circuit court decisions have indicated that the window of correction is available to public employers, regardless of whether there is an actual practice of deductions. In Paresi v. City of Portland, 182 F.3d 665 (9th Cir.), cert. denied, 528 U.S. 1133 (1999), the employees maintained that the window of correction was not available if the employer maintained a policy or practice of impermissible disciplinary deductions. While the court noted that there was no such policy or practice in the case, it also rejected plaintiffs' position, stating:

> ...the text of the regulation contains no such limitation. "The plain language of the regulation

> sets out 'inadvertence' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." Auer v. Robbins, 519 U.S. 452, 463 [other citations omitted]. The deductions made and corrected by the City were made for disciplinary reasons, which are "reasons other than lack of work" and, thus are covered by the window of correction.

Id. at 668. The Ninth Circuit also rejected plaintiffs' contention that their position was supported by DOL's position, in its amicus brief in Auer, and further noted that the Supreme Court in Auer did not refer to the amicus brief on this issue. Id.

In DiGiore v. Ryan, 172 F.3d 454 (7th Cir., 1998), there were five instances of improper docking. The court stated that, "[e]ven if these five incidents rose to the level of frequent and, thus, constituted an actual practice by the SOS officials, the officers would still be exempt from the FLSA because the SOS officials availed themselves of the regulatory 'window of correction.'" Id. at 464.

In Balgowan v. New Jersey Department of Transportation, 115 F.3d 214 (3d Cir., 1997), the court also noted the broad thrust of this Court's discussion in Auer, as authorizing wide use of the window of correction.

> As a final note, the Supreme Court in Auer stated that the salary test's "window of corrections," [sic] 29 C.F.R. §541.118(a)(6), is available to preserve the exempt status of employees who have been subjected to pay deductions inconsistent with the salary-basis test. The Court emphasized that the employer could reimburse employees not only if the deductions were 'inadvertent' but also if they were "made for reasons other than lack of work." *Auer, 117 S. Ct. at 912* (quoting 29 C.F.R. §541.118(a)(6)(alteration added)). Accordingly, if any DOT engineer's pay had been docked, the

"window of corrections" exemption could have been used by the State to preserve that engineer's exempt status.

Finally, in Davis v. City of Hollywood, 120 F.3d 1178 (11th Cir., 1997), the employer was permitted to utilize the window of correction to repay 6 employees who had been docked pay.

These post-Auer decisions are consistent with rulings in pre-Auer decisions. In International Association of Fire Fighters v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D.Va., 1989), aff'd on opn. below, 912 F.2d 463 (4th Cir., 1990), there were 26 dockings pursuant to policies which permitted this practice. The court held that the window of correction could be utilized to reimburse the employees since the City had also changed its policies and promised to comply in the future. In Lee v. Flightsafety Services Corp., 20 F.3d 428 (9th Cir., 1994), deductions were made whenever employees did not work their full weekly schedule. The court held that the window could be utilized since the deductions were made for reasons other than lack of work. "The regulation is clearly written in the disjunctive, so either circumstance [inadvertence or other than lack of work] suffices." Id., at 433.

Similarly, in Kuchinskas v. Broward County, 840 F. Supp. 1548 (S.D. Fla., 1993), aff'd, 86 F.3d 1168 (11th Cir., 1996), cert. denied, 117 S. Ct. 1080 (1997), 73 employees out of 2,000 had impermissible salary dockings, and the lower courts held that the County employer could use the window of correction to preclude liability. Certiorari was denied in Kuchinskas, on the same date that the judgment in this and several other cases were vacated in light of Auer.

By contrast, in both this case (A-3, 7-8) and Klem v. County of Santa Clara, 208 F.3d 1085, 1090-85 (9th Cir., 2000), the DOL submitted amicus briefs in which it stated that the window of correction provision is only available if

the employer had neither a policy that created a significant likelihood of deductions, nor an actual practice of making improper deductions, and both courts accepted DOL's position, as stated in its amicus briefs. In this case, the Court of Appeals also relied on the decision in Klem, as well as its pre-Auer decision in Martin v. Malcolm Pirnie, 949 F.2d 611, 616 (2nd Cir., 1991), which had held that the window of correction is only available for deductions that are inadvertent or one-time.

The plain language of section 541.118(a)(6) states that the window of correction is available provided deductions are not generally made when work is not available, and permits utilization of the window of correction whenever a deduction is made for reasons other than lack of work, if the employer reimburses the employee for such deductions and promises to comply in the future. The regulation explicitly states that the window is available even if more than one deduction has been made from a single employee: "the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." [emphasis added]

In its amicus briefs in Auer, Klem and this case, DOL has taken the position that the window of correction is available for the correction of one-time or inadvertent deductions (E-296). However, in the past, even DOL had taken a more expansive view of the reach of the window of correction. In a January 15, 1986 letter ruling, DOL had stated (A-97):

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring we would question whether the employee is actually paid "on a salary basis"

and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

Thus, DOL had recognized that occasional deductions, even from a single employee, did not destroy that employee's exemption, if the window of correction were utilized.

The parameters of "occasional" and "regular and recurring" deductions were illustrated in a January 17, 1987 opinion letter. In that letter, DOL advised an employer that it could dock the salary of exempt employees during approximately seven weeks over a two-year period, when the employees attended collective bargaining negotiations. DOL stated that the employees would be treated as non-exempt during the seven weeks in which their salaries were docked, but that this would not affect the employees' exempt status in other weeks when the employees are paid on a salary basis (A- 101-02). Thus, as of January 1987, DOL was taking the position that the docking of employees in seven weeks over a two-year period was not "regular and recurring" deductions, since it did not destroy the exemption in those weeks when no deductions were made.

Finally, in a December 24, 1991 opinion letter, DOL again stated that if deductions are made on "a regular and recurring basis (e.g., because of an employer's policy)," DOL would question whether the employees are paid on a salary basis (A- 106).

Thus, DOL has issued increasingly narrow and restrictive interpretations of the window of correction provision recently, that are inconsistent with its earlier letter ruling interpretations, and these restrictive interpretations have been adopted by at least two Courts of Appeals. DOL has done so despite unprecedented confusion and conflicting decisions concerning the standards for compliance with the salary basis test. Under

these circumstances, DOL's recent restrictive interpretation is not only inappropriate, it is also likely to lead to massive liability for public employers. Most significantly, as several courts have noted, DOL's current interpretation is inconsistent with the plain language of the window of correction regulation.

The Tenth Amendment

In National League of Cities v. Usery, 426 U.S. 833 (1976), this Court held that the Tenth Amendment prohibited application of the FLSA's minimum wage and maximum hours provisions to state and local government employees engaged in traditional governmental functions. The Court observed that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." Id. at 845. The Court concluded that the application of the FLSA to the States would thus "operate to directly displace [their] freedom to structure integral operations in areas of traditional governmental functions". Id. at 852.

Nine years later, this Court overruled National League of Cities in a five-to-four decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). The Court held that the "traditional governmental function" standard for defining the boundaries of state regulatory immunity under the Tenth Amendment had proven "unworkable". Id. at 546-47. The Court acknowledged that the scope of Congress' authority to pass legislation under the Commerce Clause had to reflect the "special position" that states occupy in our constitutional system. Id. at 547. However, the Court held, the principal restraint on federal power over the States inheres in the influence States have in the national political process

resulting from the structure of the federal government established by the Constitution, rather than from judicial review of Congressional action. Id. at 552-54.

In the fifteen years since Garcia, this Court has progressively distanced itself from that decision. In a series of Tenth Amendment cases, this Court has invalidated or limited the applicability of federal legislation on the ground that it threatened state sovereignty. In Gregory v. Ashcroft, 501 U.S. 452 (1991), this Court held that an ambiguity in the Age Discrimination in Employment Act ("ADEA") regarding whether it applied to appointed state judges should be resolved by not applying the federal law. The Court observed that the power to determine the qualifications of state judges was a fundamental element of state sovereignty, and that if a federal law was to be interpreted to restrict any such state power, the intention to do so had to be expressed in "unmistakably clear" language. Gregory v. Ashcroft, 501 U.S. at 460. The Court stated that this "plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Id. at 461.

One year later, this Court decided New York v. United States, 505 U.S. 144 (1992). That decision invalidated the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to the waste. Id. at 175-76. The Court held that in a case involving a federal exercise of authority over the States, it had to inquire whether Congress' Act "overstepp[ed] the boundary between federal and state authority" established by the Constitution. Id. at 159. The Court concluded that the "take title" provisions were "inconsistent with the federal structure of our Government established by the Constitution" because they impermissibly "commandeered" the States into implementing Congress' legislative program. Id. at 176-77.

Most recently, in Printz v. United States, 521 U.S. 898 (1997), the Court invalidated interim provisions of the Brady Act requiring local chief law enforcement officers to perform background checks on proposed transferees of firearms. The Court held that by "commandeering" local law enforcement officers to enforce a federal regulatory scheme, these interim provisions violated "the very principle of separate sovereignty" that is inherent in the structure of the Constitution. Id. at 932.

The Court did not need to reconsider Garcia in either Printz or New York because it factually distinguished these cases on the ground that they involved laws that specifically regulated the States rather than laws of general applicability. See Printz, 521 U.S. at 932; New York, 505 U.S. at 160. Nevertheless, it is apparent that these cases rejected the underlying rationale of Garcia — that the influence of the States in the national political process made judicial intervention to protect state sovereignty unnecessary.[2]

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[2] The Court's most recent Tenth Amendment decision in Reno v. Condon, 528 U.S. 141 (2000) is not to the contrary. In that case, the Court upheld the Driver's Privacy Protection Act ("DPPA"). The DPPA prohibits state departments of motor vehicles from disclosing personal information obtained from drivers and vehicle owners without their consent. Congress had found that the States had been generating significant revenues by selling this personal information to individuals and businesses and wanted to curtail this practice. The DPPA was thus intended to regulate the States acting in a proprietary capacity as sellers of information. This Court recognized in its pre-Garcia decision in National League of Cities, supra, that such federal regulation was permissible, but that the application of the FLSA to the States was not because that legislation intruded upon the core of state sovereignty protected by the Tenth Amendment. 426 U.S. at 845-51. Thus, Condon is entirely consistent with the argument that Garcia should be overruled and National League of Cities reinstated.

Two other recent decisions of the Court have increased the uncertainty regarding Garcia's continuing validity. Most recently, in Alden v. Maine, 527 U.S. 706 (1999), this Court held that the concept of state sovereignty embedded in the structure of the Constitution precluded Congress from exercising its Commerce Clause power to abrogate a state's immunity from suit by private litigants in state court. Accordingly, the Court affirmed the dismissal of the FLSA action brought in state court by the petitioners, a group of probation officers, against the State of Maine. Alden followed Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) where the Court had held that Congress could not pursuant to the Indian Commerce Clause or the Interstate Commerce Clause abrogate a state's sovereign immunity from suits by individuals in federal court. The Court based this holding on the premise that it was "inherent" in the concept of state sovereignty presupposed by the Eleventh Amendment that a state is "not to be amenable to the suit of an individual without its consent". Id. at 54.

Whether Garcia is still good law has been cast in doubt by all these recent decisions that have rejected its underlying rationale. Furthermore, Garcia's stability as a precedent of this Court always has been dubious. In the Court's five-to-four decision in Garcia, two of the dissenting justices expressed confidence that it would "in time" be overturned. Garcia, 469 U.S. at 580 (Rehnquist, J., dissenting) and 589 (O'Connor, J., dissenting). Given these dissents and the evolution of the Court's federalism jurisprudence in recent years, a number of scholarly commentators have speculated about whether Garcia will be overturned or whether it already implicitly has been overturned. See, e.g., Rotunda & Nowak, Treatise on Constitutional Law §4.10, pp. 491, 503, 508 (1999); Jaber, Unfunded Federal Mandates: An Issue of Federalism or a Brilliant Sound Bite?, 45 Emory L.J. 281, 319 (1996); Lee, The Dilemma of American Federalism: Power to the People, the States or the Federal Government, 1996 B.Y.U.

L. Rev. 329, 346-48 (1996); Schapiro, Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law, 85 Cornell L. Rev. 656, 678 (2000); Yoo, The Judicial Safeguards of Federalism, 70 S.Cal L. Rev. 1311, 1314 (1997). In light of the substantial uncertainty about Garcia, it is critical that the Court take this opportunity to reconsider that decision.

It might be argued that reconsidering Garcia is no longer of great practical importance after Alden. This is erroneous. Alden did not change that state and local governments are still bound by the FLSA under Garcia. While nonconsenting States are immune from FLSA lawsuits by private individuals, they are still subject to enforcement actions by the federal Department of Labor. Furthermore, local governments still have no immunity from FLSA litigation. FLSA litigation against local governments continues to proliferate and to impose a substantial burden on judicial resources. In addition, the FLSA (and DOL's regulations under the FLSA) continue to impose a significant burden upon the States and their political subdivisions both financially and in terms of their autonomy. Thus, reconsideration of Garcia remains a matter of compelling practical importance to the States and localities.

Even if this Court does not wish to reconsider Garcia, this case still poses an important Tenth Amendment issue. While Garcia held judicial intervention generally was not required to enforce the Tenth Amendment, that decision left open the possibility that in a specific case, "failings in the national political process" to adequately represent state interests could give rise to a judicially enforceable Tenth Amendment claim. Garcia, 469 U.S. at 554; see also South Carolina v. Baker, 485 U.S. 505, 512 (1988). Garcia held that there were no such defects in the process that led to the 1966 and 1974 amendments extending the FLSA's minimum wage and maximum hours provisions to state and local governments. There was no occasion in Garcia to consider whether there was any such

defect in the process leading to DOL's promulgation of regulations pursuant to the FLSA. DOL had no reason previously to consider the interests of state or local governments in its regulations because prior to Garcia, there had been no reason to believe that the regulations applied to the States or localities.

In fact, the "salary basis test" at issue in this case was developed in 1954, decades before the FLSA became applicable to the public sector. 57 Fed. Reg. 37666 (August 19, 1992). Under this test, an employee is deemed to be paid on a "salary basis", with certain exceptions, when the employee is required to "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 C.F.R. §118(a). This test was intended as an indicator of status as an exempt "executive", "administrative" or "professional" employee in the private sector where such employees were nearly universally paid on a "salary basis" Id. While this test may have been a valid indicator of such managerial status in the private sector, it is a highly inaccurate indicator of managerial status in the public sector where the principle of public accountability applies. Although DOL was slow to do so, it ultimately recognized that applying the salary basis test to the public sector undermined Congress' intent to allow the same exemption from the FLSA for public sector managers as for private sector managers. Unfortunately, DOL's response was limited to modifying the salary basis test by eliminating the prohibition on partial-day docking for exempt public sector employees. 57 Fed. Reg. 37666; 29 C.F.R. §541.5d.

The application of this modified version of the salary basis test to public sector employees still clashes with the principles of public accountability and progressive discipline. It still means that state and local governments have to pay their managerial employees for time spent testifying in a matter that involves no official business and in which the employee even might have a personal interest. It still means that state and local governments can be

required to pay managerial employees for any "temporary" military leave time and cannot apply any reasonable limit they might have on the duration of such paid leave time. Finally, it still means that state and local governments cannot discipline their managerial employees (except when the employees violate safety rules of major significance) by suspending them without pay for less than a week or by imposing a fine. Thus, this modified test still intrudes fundamentally upon the right of state and local governments to determine their own time, leave and disciplinary policies for their managerial employees free from interference by the federal government.

Moreover, it is evident that the legitimate interests of the States and localities were not fairly considered in the political process that led to DOL's failure to abolish the salary basis test for state and local government employees. Significantly, the federal government recognizes the impracticality of applying the salary basis test in the public sector when it comes to its own employees. The federal Office of Personnel Management ("OPM") administers the FLSA with respect to federal employees (other than employees of the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority). See 29 U.S.C. §204(f). OPM uses no "salary basis test", but only a "duties test", to identify those federal employees who qualify for the executive, administrative and professional exemptions from the FLSA. See 5 C.F.R. §§551.205-.207. Yet, although the federal government understands the inappropriateness of applying a salary basis test to identify its own exempt white collar employees, it refuses to acknowledge the same when it comes to identifying state and local government white collar employees. There is no rationale for this differential treatment of federal and non-federal public sector employees. This differential treatment can be explained only by a blatant failure by the federal government to fairly consider the interests of the States and localities. This is precisely the type of defect in the national political process

that even Garcia recognized had to be redressed by judicial intervention pursuant to the Tenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2, 2001

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued May 3, 2000 Decided October 2, 2000)

Docket No. 99-9310

HAROLD YOURMAN, RALPH BISHOP, WILLIAM H. DWORKIN, FREDERICK EWALD, JOHN L. HENDRICKSON, RICHARD KREPELA, ROBERT P. McCARTHY, FRANK MEYER, ANTHONY PUNZI, RONALD L. SAVITT, On Behalf of Themselves & All Other Employees Similarly Situated, RONALD A. BROW,

Plaintiffs-Appellants,

-v.-

RUDOLPH GIULIANI, As Mayor of the City of New York, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, NEW YORK CITY HEALTH & HOSPITALS CORPORATION,

Defendants-Appellees.

Before:

MESKILL, CABRANES and KATZMANN,

Circuit Judges.

Employees of the City of New York, the New York Health and Hospitals Corporation, and the Board of Education of the City School District of the City of New York appeal a decision of the United States District Court for the Southern District of New York, Preska, *J.*, granting summary judgment against them on their claims for overtime compensation under the Fair Labor Standards Act.

Vacated and remanded.

JOAN STERN KIOK, New York City (Robert N. Felix, New York City, of counsel), *for Appellants.*

MARILYN RICHTER, Assistant Corporation Counsel, City of New York, New York City (Michael D. Hess, Corporation Counsel of the City of New York, Leonard Koerner, Assistant Corporation Counsel, City of New York, New York City, of counsel), *for Appellees.*

Henry L. Solano, Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, United States Department of Labor, Washington, D.C., *for Amicus Curiae The Secretary of Labor.*

MESKILL, *Circuit Judge*:

Plaintiffs-appellants represent a class of individuals employed by the City of New York, the New York City Health and Hospitals Corporation (HHC), and the Board of Education of the City School District of the City of New York (BOE). In April 1991 they filed this lawsuit in the United States District Court for the Southern District of New York, Preska, *J.*, against defendants-appellees the Mayor of the City of New York, the HHC and the BOE seeking unpaid overtime compensation under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA). On cross-motions for summary judgment, the court held that the plaintiffs were not entitled to overtime, finding that they were "executive, administrative, or professional" employees exempt from the overtime pay requirement under the "salary basis" test promulgated by the Secretary of Labor (Secretary). After hearing oral argument in this case, we requested an *amicus* brief from the Department of Labor (DOL). Having reviewed the *amicus* brief and the parties' responses to it, we largely adopt the Secretary's interpretation of the salary basis test, and we vacate the district court's judgment and remand for further proceedings.

BACKGROUND

The facts in this case are presented thoroughly in the district court's opinions. *See Yourman v. Dinkins*, 826 F. Supp. 736 (S.D.N.Y. 1993) (*Yourman I*); *see also Yourman v. Giuliani*, 1999 WL 799803 (S.D.N.Y. Oct. 7, 1999) (*Yourman II*). We assume familiarity with those opinions and recount the facts here only to the extent necessary to resolve this appeal.

Employees of the City, the HHC and the BOE are subject to written time and leave regulations that govern minimum work weeks, annual leave allowances, sick leave allowances, etc. Various scenarios exist under these regulations permitting pay deductions from employee compensation. For example, employees are subject to pay deductions in instances where they have been absent from work but have exhausted their leave allowances or have not received approval for use of leave allowances. Employees are also subject to discipline, including suspension without pay, for infractions such as insubordination, abuse of sick leave, refusal to report for drug testing, conduct unbecoming, theft of agency property, and misuse of an agency car.

In *Yourman I*, the district court granted summary judgment to the employees, appellants here, finding that they were not exempt under the FLSA because they were not compensated on a salary basis. *See Yourman I*, 826 F. Supp. at 740-44. In particular, the district court found that the time and leave regulations were inconsistent with the DOL regulation defining "salary basis," because (1) the employees were subject to disciplinary deductions for infractions of safety rules not of major significance, *see id.* at 741 (citing 29 C.F.R. § 541.118(a)(5)), and (2) the employees might have had to take leave without pay to testify in court or to satisfy military service obligations, *see id.* at 742 (citing 29 C.F.R. § 541.118(a)(4)). The court concluded that the employees were not exempt from FLSA coverage whether or not they had suffered any actual deductions from pay. *See id.* at 742-44 (relying in part on *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615-17 (2d Cir. 1991)). In a separate opinion, the court held that the

employees were entitled to liquidated damages and back overtime pay, *see Yourman v. Dinkins*, 865 F. Supp. 154 (S.D.N.Y. 1994), and judgment was entered accordingly.

The defendants appealed, and we affirmed. *See Yourman v. Dinkins*, 84 F.3d 655 (2d Cir. 1996) (per curiam). Although we recognized a division of authority as to whether actual deductions from pay were required in order to find that the salary basis test was not met, we "agree[d] with the conclusions reached by Judge Preska in her comprehensive opinions, and [we left] the ultimate resolution of the statutory dispute to the Supreme Court or the Congress." *Id.* at 656.

The Supreme Court granted *certiorari* and vacated and remanded in light of *Auer v. Robbins*, 519 U.S. 452 (1997). In *Auer*, the Court held that the salary basis test is not satisfied only "if there is either an actual practice of making [pay] deductions or an employment policy that creates a significant likelihood of [pay] deductions," *id.* at 461 (internal quotation marks omitted), adopting the interpretation espoused by the Secretary of Labor as *amicus curiae* in that action. We then remanded the case to the district court.

On remand, the district court denied the employees' motion to reinstate the judgment. Instead, the court granted summary judgment to the employers, *i.e.*, the City, the BOE and the HHC. *See Yourman II*, 1999 WL 799803, at *18. The employees appealed, and, after oral argument, we requested an *amicus* brief from the DOL. Having received the DOL's comprehensive response and the parties' letter briefs in reply, we vacate the district court's judgment and remand for further proceedings.

DISCUSSION

The Fair Labor Standards Act entitles employees to time-and-a-half overtime for hours worked in excess of forty hours per week, *see* 29 U.S.C. § 207(a)(1), except for those employees "employed in a bona fide executive, administrative, or professional capacity," *see id.* § 213(a)(1). The Secretary of Labor has "broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees." *See Auer*, 519 U.S. at 456 (alterations in original) (quoting 29 U.S.C. § 213(a)(1)).

Regulations promulgated by the Secretary provide that an employee is employed in a "bona fide executive, administrative, or professional" capacity only if he or she is compensated on a "salary basis."[1] *See id.* at 455 (citing 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e)). "An employee will be considered to be paid 'on a salary basis' . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). Deductions from pay in less than one week increments for disciplinary violations are inconsistent with

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[1] Administrative and professional employees may also be compensated on a "fee basis." *See* 29 C.F.R. §§ 541.2(e), 541.3(e); *see also id.* § 541.313. However, none of the parties here claims that the appellants were paid on a fee basis.

compensation on a salary basis. *See Auer*, 519 U.S. at 456; *see also* 29 C.F.R. § 541.118(a) ("The employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked."). "The Secretary is of the view that employees whose pay is adjusted for disciplinary reasons do not deserve exempt status because . . . true 'executive, administrative, or professional' employees are not 'disciplined' by piecemeal deductions from their pay." *See Auer*, 519 U.S. at 456.

The regulation allows for a "window of correction," *see Martin*, 949 F.2d at 616, so that when "a deduction not permitted by [the regulation] is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. § 541.118(a)(6). However, the window of correction is not available if an employer "engages in a practice of making impermissible deductions in its employees' pay, or has a policy that effectively communicates to its employees that such deductions will be made." *Klem v. County of Santa Clara*, 208 F.3d 1085, 1091 (9th Cir. 2000) (internal quotation marks omitted) (detailing Secretary's interpretation of the window of correction rule); *see also Martin*, 949 F.2d at 616-17 (denying "window of correction" where employer had policy of docking pay for missing work).

> To interpret the rule otherwise would allow an employer to treat its employees as exempt for overtime purposes while, at the same time, intentionally failing to comply with the "salary basis" rule. In the event that its employees sued for

> overtime pay, such an employer simply could use the window of correction to comply retroactively with the salaried-basis requirements. According to the Secretary, such a result would render the "salary basis" rule "essentially meaningless" and run counter to the rule that FLSA exemptions are to be construed narrowly.

Klem, 208 F.3d at 1092.

In *Auer*, the Supreme Court held that the Secretary's interpretation of the salary basis test is "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Auer*, 519 U.S. at 461 (internal quotation marks omitted); *see also Christensen v. Harris County*, 120 S. Ct. 1655, 1663 (2000) (noting that "*Auer* deference is warranted only when the language of the regulation is ambiguous"). Therefore the Court adopted the Secretary's understanding, expressed in an *amicus* brief, that employee compensation is "subject to reduction" only "if there is either an actual practice of making [pay] deductions or an employment policy that creates a significant likelihood of [pay] deductions," *id.* (internal quotation marks omitted).

Thus, in reviewing the district court's decision to grant summary judgment, we must consider whether the appellants have shown either an employment policy creating a "significant likelihood" of pay deductions or an "actual practice" by the employers of making pay deductions.

I. *Employment Policy Creating Significant Likelihood of Deductions*

The district court found no genuine issue of material fact as to the existence of an employment policy creating a "significant likelihood" of impermissible pay deductions. *See Yourman* II, 1999 WL 799803, at *6-8. The court explained that the employers' written policies either did not "contain[] rules applicable only to managers" or did not "effectively communicate that [pay] deductions 'would in fact be made in specified circumstances.'" *Id.* at *7 (citing *Ahern v. County of Nassau*, 118 F.3d 118, 121-22 (2d Cir. 1997)). We agree.

"A finding of 'significant likelihood' pursuant to *Auer* requires the existence of a 'clear and particularized policy—one which effectively communicates that deductions *will be* made in specified circumstances.'" *Ahern*, 118 F.3d at 121 (quoting *Auer*, 519 U.S. at 461). Even though the *Ahern* plaintiffs "definitively showed that their employment manual [permitted] the relevant deductions . . . [t]hey did not demonstrate . . . that such deductions would in fact be made in specified circumstances." *Id.* at 121-22. Therefore, we held the showing to be inadequate as a matter of law. *See id.* at 122.

Likewise, the appellants here point to admissions by the employers that managerial employees were subject to disciplinary deductions and that, at least in rare instances, such deductions were made. Even assuming those facts to be true, the appellants have shown only that such deductions were permitted, not that they would "in fact be made in specified circumstances." Therefore, the district court properly granted summary judgment on this issue.

II. *Actual Practice Of Impermissible Deductions*

The more complex question is whether the appellants have shown, sufficient to avoid summary judgment, the existence of an "actual practice" of making impermissible pay deductions. The district court held that they had not. *See Yourman* II, 1999 WL 799803, at *8-17. Although the appellants alleged at least 148 actual disciplinary deductions, the court found that "[t]his overstates the number of actual deductions for a variety of reasons." *Id.* at *9. First, the court held that, with respect to the City, the existence of any "actual practice" would have to be determined on an agency-by-agency basis. *See id.* at *4-6. Therefore, deductions imposed by City agencies not employing any of the appellants, *i.e.*, the "non-*Yourman* agencies," could not be included in the total number of deductions. *See id.* at *9. Second, the court held that any deductions imposed prior to April 1989 were barred by the statute of limitations and could not be used to show an "actual practice." *See id.* Third, the court held that each imposition of a fine, even if imposed as multiple deductions, "reflects one decision to impose discipline based on a single course of misconduct" and, therefore, counted as only a single pay deduction. *Id.*

Having thus framed its analysis, the court considered, for each City agency, the BOE and the HHC, whether there was an actual practice of pay deductions. Of the forty-eight City agencies, only fifteen agencies employed one or more of the appellants, and only seven of those were "alleged to have actually used suspensions or fines as a form of discipline for misconduct of managers within the relevant time period." *Id.* Of the seven agencies, the court found that one had imposed no improper

deductions and that six had imposed one or two impermissible deductions over the relevant time period. *See id.* at *9-13. The court, citing *Auer*, held that one or two deductions did not constitute an actual practice and, therefore, permitted each agency to utilize the window of correction and cure the impermissible deductions by reimbursing the affected employees for such deductions. *See id.* In the alternative, the court noted that if all the City agencies were viewed as one entity, "there would be twelve deductions out of a workforce of 1,814 managers, roughly 0.7%" and found "that number insufficient to establish an actual practice." *Id.* at *13 (footnote omitted).

Turning to the BOE, the court found only one impermissible deduction. *See id.* at *13-14. Therefore, the court held that no actual practice of impermissible deductions existed and allowed the BOE to cure the impermissible deduction. *See id.*

Finally, the court found four impermissible deductions imposed by the HHC. However, the court noted that "out of 3,708 HHC managers, four deductions constitute only 0.1%. This is not sufficient to constitute a practice of deductions." *Id.* at *15. Therefore, the court also permitted the HHC to cure the impermissible deductions. *See id.*

We disagree with the district court's analysis in several respects. First and foremost, the existence *vel non* of an "actual practice" of imposing pay deductions cannot be decided by the simple expedient of dividing the number of impermissible deductions by the number of managerial employees. Second, the court applied the wrong standard in holding that the existence of an actual practice was to be

determined on an agency-by-agency basis. Third, the court incorrectly excluded pay deductions imposed outside of the statute of limitations period. Each of these issues is addressed in greater detail below.

A. *What Constitutes An Actual Practice?*

The purpose of the salary basis test is to distinguish "true" executive, administrative, or professional employees from non-exempt employees, *i.e.*, employees who may be disciplined "by piecemeal deductions from . . . pay." *See Auer*, 519 U.S. at 456. Actual deductions from pay are neither necessary for an employee to be found non-exempt, *see id.* at 461 (rejecting "wooden requirement" of such deductions), nor are they sufficient, *see* 29 C.F.R. § 541.118(a)(6) (allowing employers to correct "inadvertent" deductions). However, an employer that engages in an actual practice of making impermissible deductions "necessarily has no intention of paying its employees on a 'salary basis,'" *Klem*, 208 F.3d at 1091 (internal quotation marks omitted), and, therefore, cannot claim that its employees are exempt from the overtime pay requirements.

Thus, in determining what constitutes an "actual practice" of pay deductions, we bear in mind the object of the inquiry: whether the employer's practices reflect an "objective intention" to pay its employees on a salaried basis. *See id.* That question cannot be answered by simply dividing the number of impermissible pay deductions by the number of managerial employees, but necessarily involves consideration of additional factors such as the number of times that other forms of discipline are imposed, the number of employee infractions warranting discipline, the existence of policies favoring or disfavoring pay

deductions, the process by which sanctions are determined, and the degree of discretion held by the disciplining authority. *Cf. Auer*, 519 U.S. at 462 (taking note of "unusual circumstances" surrounding improper pay deduction).

The Secretary of Labor takes the same position in its *amicus* brief, stating that "[t]here can be no bright-line test for determining what constitutes an 'actual practice' of making impermissible deductions" and suggesting various factors (included among those listed above) that may be pertinent to this "factual determination . . . best left to the trial court." In addition to the deference we owe to the DOL's interpretation of its own regulation, *see id.* at 461, we agree with that interpretation. Compare two examples: (1) an employer that regularly docks the pay of managers who come to work five hours late, and (2) an employer that only sporadically docks the pay of managers who come to work five minutes late. The first employer surely would have more of an "actual practice" than the second employer, even though the penalties imposed by the second employer could far outnumber the penalties imposed by the first. A mechanical comparison of the number of deductions with the number of managerial employees simply cannot capture the fact specific inquiry into an employer's intent, as reflected in its practice of imposing deductions from pay, and inevitably will produce inconsistent results. *See, e.g., Klem*, 208 F.3d at 1095 (finding actual practice despite argument that number of pay deductions per manager was smaller than in other cases where no actual practice was found); *Yourman II*, 1999 WL 799803, at *8 ("[C]ourts in the post-*Auer* era have varied as to how many actual deductions are necessary to constitute an actual practice.") (citing cases).

On remand, the district court should weigh the factors listed above, in addition to any others relevant to the existence of an actual practice, in determining whether either party is entitled to summary judgment. It is worth noting that this more nuanced inquiry renders somewhat irrelevant a dispute that was argued both below and on appeal: whether a single disciplinary fine that is imposed as multiple pay deductions counts as a single pay deduction or as multiple pay deductions. The district court held that such fines should be treated as single deductions, *see id.* at *9, and the DOL agrees. To hold otherwise would "penalize[] defendants for an accommodation made to the individual employees, that is, spreading a single fine over a number of installments." Id. In other words, an employer's decision to provide such an accommodation, standing alone, does not reflect an "objective intention" not to pay its employees on a salaried basis. Nevertheless, the number of impermissible pay deductions is only one factor to consider among many, and it ultimately may not matter whether a fine is viewed as a single deduction or as multiple deductions once the district court properly weighs all the circumstances under which such fines are, or are not, imposed.

B. *Who Is The Employer?*

Next, the district court erred by deciding, as a matter of law, that its analysis must proceed on an agency-by-agency basis rather than on a citywide basis. In holding that each agency must be considered separately, *see id.* at *4-6, the district court in essence granted summary judgment to the City on the employees' claim that the City itself engaged in an actual practice of imposing pay deductions, without properly applying the usual standards governing summary judgment.

Drawing all factual inferences in favor of the party opposing summary judgment, *i.e.*, the City employees, *see Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994), there indeed may be a genuine issue of material fact as to the existence of an actual citywide practice of imposing impermissible pay deductions. The most telling evidence in this regard is the 1993 memorandum directed to all City agencies by the City Personnel Director after the decision in *Yourman I* in favor of the employees. The memorandum set forth detailed guidelines intended to mandate compliance with the FLSA and, in particular, to ensure that managerial employees were not subject to pay deductions that would render them non-exempt. *Id.* at *4-5. The City employees also pointed to an earlier, 1986 memorandum that discussed compliance with the FLSA and was addressed to "all agency heads," as well as to evidence showing that certain time and leave rules were applied uniformly to all City managers and that all agency heads were required to report to the Commissioner of Citywide Administrative Services. *Id.* This evidence suggests that there may have been citywide policies permitting pay deductions and that the agency heads were subject to supervision with respect to their disciplinary authority, both of which are factors that may tend to show the existence of an actual citywide practice of pay deductions.

The district court, however, pointed out that "responsibility for employee discipline is vested in the head of each City agency" and that some agencies "have their own policies concerning codes of conduct and/or discipline." *Id.* at *5. The district court concluded that "each agency must be considered separately because of the different rules applicable and the authority of each

individual agency head over discipline in his or her agency." *Id.* at *6. Although the district court's analysis shows, perhaps, that each City agency has sufficient autonomy, organizational structure, and governmental character to be treated as an employer under the FLSA, *cf.* United States Census Bureau, 1 *1997 Census of Governments: Government Organization*, at ix (1999) ("[T]o be counted as a government, any entity must possess . . . existence as an organized entity, governmental character, and substantial autonomy.") [hereinafter, *Census of Governments*], it does not show that the City is incapable, as a matter of law, of also engaging in (or not engaging in) an actual practice of impermissible pay deductions.

The Secretary of Labor, in her *amicus* brief, states that the question of whether a municipal agency must be treated independently of the municipality in determining the existence of an actual practice "ultimately must be a case-by-case analysis," guided in large part by the *Census of Governments*. *Cf.* 29 C.F.R. §§ 553.102(b), 553.227(c), 825.108(c)(1) (relying on *Census of Governments* in various contexts); 52 Fed. Reg. 2012, 2019-20 (1987). Because the City agencies discussed by the district court are not viewed as separate entities in the *Census of Governments*, the DOL takes the position that those agencies cannot be treated independently. We do not agree. The DOL assumed, like the district court, that the appellants could proceed either against the City or against each City agency, but not, as a matter of law, against both. That assumption is flawed, and the appellants may offer to show an actual practice of pay deductions by any entity that satisfies the FLSA definition of an "employer." *See* 29 U.S.C. § 203(d) (defining "employer"); *Torres-Lopez v.*

May, 111 F.3d 633, 639-45 (9th Cir. 1997) (permitting claims against joint employers under FLSA); *Antenor v. D & S Farms*, 88 F.3d 925, 929-38 (11th Cir. 1996) (same).

Therefore, we remand for the district court to decide, in light of the relevant factors, whether the City employees have shown an actual practice by the City or by any relevant City agency sufficient to defeat summary judgment.

C. *Which Pay Deductions Are Relevant?*

Having determined that the appellants may attempt to show a citywide practice of pay deductions, it follows that the district court should consider pay deductions imposed by any of the City agencies, not only pay deductions imposed by agencies employing one or more of the appellants. *See Klem*, 208 F.3d at 1095 ("All improper suspensions of employees in Plaintiffs' classification are relevant to answering that question.").

Furthermore, the district court must consider pay deductions dating back to April 1986, when the mandate issued in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which upheld the application of the FLSA to public sector employees. *See Davis v. City of Hollywood*, 120 F.3d 1178, 1180 (11th Cir. 1997). Although the appellants may not recover damages or back pay for violations of the FLSA prior to the applicable limitations date, April 1, 1989, any impermissible deductions before that time nonetheless would have relevance to the existence of an actual practice of imposing such deductions.

As the Secretary's *amicus* brief notes, a somewhat analogous situation exists under Title VII, where we have explained that "statistical evidence of pre-Act discrimination can be probative of ongoing, post-Act discrimination." *Ottaviani v. State Univ. of New York at New Paltz*, 875 F.2d 365, 376 (2d Cir. 1989) (citing *Bazemore v. Friday*, 478 U.S. 385, 402 (1986)); *see Sobel v. Yeshiva Univ.*, 839 F.2d 18, 30 (2d Cir. 1988). A similar rationale applies here, so on remand, the district court should not limit its consideration only to those pay deductions imposed during the limitations period in determining whether an actual practice exists. *See Klem v. County of Santa Clara*, 1998 WL 440425, *2-5 (N.D.Cal. July 9, 1998) (finding actual practice of pay deductions based on pattern of disciplinary deductions that began prior to limitations period of one plaintiff class), *aff'd*, 208 F.3d 1085 (9th Cir. 2000); *see also Davis*, 120 F.3d at 1180; *Childers v. City of Eugene*, 120 F.3d 944, 946 n.2, 947 (9th Cir. 1997).

CONCLUSION

The district court's judgment is vacated, and the case is remanded for proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD YOURMAN et al.,

Plaintiffs,

- against -

RULDOLPHGIULIANI as Mayor of the City of New York et al.,

Defendants.

91 Civ. 2197 (LAP)

MEMORANDUM AND ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiffs are employees of the City of New York (the "City"), the New York Health and Hospitals Corporation (the "HHC"), and the Board of Education of the City School District of the City of New York (the "BOE") who have been designated as managerial employees by their respective employers. They bring this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, seeking unpaid overtime compensation at time-and-one-half their regular rate of pay for all hours worked in excess of forty hours each week. See 29 U.S.C. § 216(b).

On July 12, 1993, I granted plaintiffs' motion for summary judgment against defendants holding them liable

under the FLSA for failing to pay overtime compensation as required by the statute. Yourman v. Dinkins, 826 F. Supp. 736 (1993) (hereinafter "Yourman I"). That decision was affirmed by the Court of Appeals, 84 F.3d 655 (2d Cir. 1996) and certiorari granted by the Supreme Court of the United States, 519 U.S. 1145, 117 S. Ct. 1078, 137 L. Ed. 2d 213 (1997). The Supreme Court subsequently vacated the decision and remanded the matter to the Court of Appeals for reconsideration in light of the Court's recent decision in Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). The Court of Appeals then remanded the case instructing that:

the District Court should consider both the applicability of the salary basis test, as construed in Auer, to the plaintiffs-appellees, and the applicability of the corrective provision of 29 C.F.R. § 541.118(a)(6) to any of the plaintiffs-appellees for whom deductions have been made.

For the reasons stated below, I find that the Supreme Court's decision in Auer changes the applicable standard used in Yourman I and thus, the result as to plaintiffs' original summary judgment motion. Accordingly, plaintiffs' motion to reinstate the judgment is denied, and defendants' cross-motion for summary judgment is granted.[1]

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[1] The following submissions have been considered in resolving this motion: Plaintiff's Motion to Reinstate the Judgment, Declaration of Joan Stern Kiok with Exhibit Annexed and Rule 56.1 Statement ("Pl. 56.1 Statement" or "Kiok Decl."); Memorandum on Behalf of Plaintiffs

BACKGROUND

The undisputed facts set out in Yourman I will not be presented here. Familiarity with that decision is assumed. See 826 F. Supp. at 737-740. For purposes of the present motion, it suffices to recall that defendants' main contention in opposition to liability under the FLSA was that plaintiffs were "employed in a bona fide executive, administrative, or professional" capacity and therefore excluded from the statute's overtime requirements. See 29 U.S.C. § 213(a)(1). Plaintiffs argued that they did not fall within the exclusion because they were not compensated on a "salary basis," as required by the applicable regulation. See 29 C.F.R. § 541.118(a). In the underlying decision, I found that critical to the determination of whether plaintiffs should receive overtime compensation under the FLSA was an analysis of the circumstances under which deductions could have been made by defendants from plaintiffs'

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in Support of their Motion to Reinstate the Judgment ("Pl. Mem."); Memorandum of Plaintiffs in Response to Defendants' Motion for Summary Judgment ("Pl. Reply Mem."); Plaintiffs' Response to Defendants' Rule 56.1 Statement ("Pl. Responsive 56.1 Statement"); Defendants' Notice of Motion for Summary Judgment with 56.1 Statement and Declarations of Marilyn Richter, Michael D. Hess ("Hess Decl."), Kenneth J. Godiner, Philip Bibla ("Bibla Decl.") and Dawn Besthoff; Defendants' Responsive 56.1 Statement ("Def. Responsive 56.1 Statement"); Defendants' Memorandum of Law in Support of Their Cross-Motion for Summary Judgment ("Def. Mem."); Defendants' Reply Memorandum of Law in Opposition to Plaintiffs' Motion to Reinstate the Judgment and in Further Support of their Cross-Motion for Summary Judgment ("Def. Reply Mem."); Joint Appendix ("JA"); Plaintiffs' Appendix, Volumes I and II ("PA"); Defendants' Appendix, Volumes 1, 2, 3 and 4 ("Def. Ex.").

compensation. 826 F. Supp. at 738. More specifically, the underlying decision, that plaintiffs could not be considered salaried employees and were therefore not excluded from FLSA coverage, was not dependant upon the occurrence of any actual deductions in compensation but instead on whether managers' compensation was "subject to" reduction. Id. at 744. Based on the Supreme Court's subsequent decision in Auer, plaintiffs now allege that they endured actual disciplinary deductions, disciplinary fines paid by means other than payroll deductions, e.g., by personal check, deductions for failure to pay late payment fines and deductions for military leave and court appearances, sufficient to render them non-exempt under FLSA. (Pl. 56.1 Statement PP 40-44; Kiok Decl., Ex. A; JA 19; Pl. Mem at 23, n.15). Each alleged actual deduction will be addressed in the discussion, infra, III.C.

DISCUSSION

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), "[a] motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 36 (2d Cir. 1994); see Fed. R. Civ. P. 56(c). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986);[Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict

for the nonmoving party," and facts are material to the outcome of the particular litigation if application of the relevant substantive law requires their determination. Anderson, 477 U.S. at 248.

"A party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists and that the undisputed facts entitle it to judgment as a matter of law." Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996); accord Chambers, 43 F.3d at 36. "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial," however, "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995); accord Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("The moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The moving party, in other words, does not bear the burden of disproving an essential element of the nonmoving party's claim.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "affidavits, depositions, or other sworn evidence as permitted by Fed. R. Civ. P. 56, setting forth specific facts showing that there exists a genuine issue of material fact." Rule, 85 F.3d at 1011; accord Fed. R. Civ. P. 56(e); Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525-26 (2d Cir. 1994). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Instead, the

nonmovant must "'come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely . . . on the basis of conjecture or surmise.'" Trans Sport, Inc. v. Starter Sportswear, 964 F.2d 186, 188 (2d Cir. 1992) (citation omitted).

"In ruling on a motion for summary judgment, the district court is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment." Id.; accord Chambers, 43 F.3d at 36. "The function of the district court in considering the motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried." Rule, 85 F.3d at 1011. Accordingly, "assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment." Id. Similarly, "any weighing of the evidence is the prerogative of the finder of fact." Id. "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chambers, 43 F.3d at 37 (emphasis added).

I. The FLSA Claim Under the Auer v. Robbins Standard

Under the FLSA, employees who work over forty hours in a single week are entitled to overtime compensation unless the employee qualifies as being "employed in a bona fide executive, administrative, or professional capacity" and is paid on a salary basis. 29 U.S.C. § 213(a)(1). The FLSA is a remedial statute, thus exemptions are to be narrowly construed against the employer who seeks to assert them, and the burden rests with defendants to demonstrate that plaintiffs fall within the exception. See Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 80 S. Ct. 453, 456, 4 L. Ed. 2d 393 (1960); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991), cert. denied, 506 U.S. 905, 113 S. Ct. 298, 121 L. Ed. 2d 222 (1992).

As noted above, exempt status from the FLSA's overtime provisions requires that employees be paid on a salary basis. The regulations promulgated by the Secretary of Labor provide that an employee will be considered to be paid on a salary basis:

if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the

general rule that an employee need not be paid for any workweek in which he performs no work.

. . .

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

29 C.F.R. § 541.118(a) (emphasis added).

The Supreme Court's decision in Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), resolved the conflict among the circuits as to when, under the salary basis test, a public-sector employee's pay is considered subject to reduction for disciplinary or other deductions and, therefore, not exempt from the FLSA's overtime compensation requirement. In formulating its definition, the Court deferred to the Secretary of Labor's interpretation of the applicable regulations, noting that "because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is . . . controlling unless plainly erroneous or inconsistent with the regulation." Id. at 461 (internal citations and quotation marks omitted).

According to the Secretary of Labor, exempt status under the salary basis test is not available "when employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.'" Auer, 519 U.S. at 461. That standard is met where there is either (1) "an actual practice of making such deductions"; or (2) "an

employment policy that creates a 'significant likelihood of such deductions.'" Id. "Thus, in the absence of evidence that disciplinary and other deductions have been made in the past, denial of the exemption is appropriate only if there is 'a clear and particularized policy -- one which 'effectively communicates' that deductions will be made in specified circumstances.'" Kelly v. City of Mount Vernon, 162 F.3d 765, 768 (2d Cir. 1998) (quoting Auer, 519 U.S. at 461). "'In other words,' the employees must be able to 'point to [a] rule that state[s] that if they commit[] a specific infraction, their pay [will] be docked.'" Kelly , 162 F.3d at 768 (quoting Ahern v. County of Nassau, 118 F.3d 118, 122 (2d Cir. 1997)). "The mere possibility of an improper reduction in pay does not defeat an employee's salaried status" if plaintiffs cannot point to a practice of making such deductions. Auer, 519 U.S. at 460 (quoting Auer v. Robbins, 65 F.3d 702, 710-11 (8th Cir. 1995)). Thus, the Supreme Court announced a standard different from the "subject to reduction" standard applied in Yourman I and vacated and remanded that decision for review under this new standard.

Applying the standard announced to the facts in Auer, the Court found that a police manual which nominally covered all employees and included disciplinary deductions among some of the specified penalties did not constitute a policy that created a significant likelihood of deductions within the meaning of the salary basis test. 519 U.S. at 461-462. The manual did not effectively communicate that pay deductions were an anticipated form of punishment for employees in petitioners' category because the available penalties applied both to petitioners and to employees who were unquestionably not paid on a salary basis. Id. at 462. Finally, the Court held that

evidence of a one-time deduction made under unusual circumstances did not establish a likelihood of disciplinary deductions against those in petitioners' category. Id.

III. Application of Auer

A. Agency-by-Agency Analysis

At oral argument on July 30, 1999, counsel agreed that the HHC and the BOE should be treated as separate defendants. They dispute, however, whether the defendant City agencies should be treated together as a single entity or if each City agency should be treated as a single defendant. Defendants contend that the analysis should be on an agency-by-agency basis because the policies for the City of New York are not uniform for all agencies but are promulgated on an agency-by-agency basis.

In support of their argument that all agencies should be treated together, plaintiffs point to Executive Order 105, which amended Executive Order 16, and provides that inspectors general assigned to each City agency] all report to the Commissioner and are all employed by the Department of Investigation, which oversees all agencies. (Pl. Responsive 56.1 Statement P 4). Plaintiffs also argue that the 1993 amendments to the time and leave rules are applied uniformly to all city managers. In addition, plaintiffs point to the 1986 memorandum regarding compliance with the FLSA which was addressed to all "agency heads." (See PA 6).

Finally, plaintiffs rely on the city-wide disciplinary directive issued on September 15, 1993, by Herman Jenkins (hereinafter, the "Jenkins Memorandum"), then the City

Personnel Director, which, in response to Yourman I, restricted the possible disciplinary penalties that may be applied to managerial employees. (Bibla Decl. P 7). The directive which was issued to each City agency, as well as the BOE and the HHC stated that:

- Except for an infraction of a safety rule of major significance which creates a serious danger to the work site or to other employees, the following disciplinary penalties are prohibited: docking of pay; docking of annual leave; suspension without pay and fines. In addition, managerial lump sum payments may not be docked for misconduct.

- A manager's pay may not be docked in connection with a 30-day suspension prior to resolution of disciplinary charges.

- A manager's pay may not be docked for temporary military leave, regardless of the length of the leave. However, if during a calendar year, a manager's military leave exceeds, in the aggregate, 30 calendar days or 22 working days, whichever is greater, then for the excess number of days, the manager must remit to the City an amount equal to the amount received in military pay for these excess days, provided, however, that in no case may the manager be required to remit to the City an amount greater than the amount of the manager's salary for these excess days.

- A manager's pay may not be docked for attendance as a witness at any deposition, examination before trial, grand jury proceeding, court hearing or trial, or hearing or investigation before an administrative agency or legislative body. However, to be eligible for this paid leave, the

manager must remit to the City an amount equal to the amount received for such attendance as a witness, less any amount received as reimbursement for travel expenses, provided, however, that in no case may the manager be required to remit to the City an amount in excess of the amount of the manager's salary for the period of such leave with pay. In addition, the manager must submit satisfactory evidence of actual attendance as a witness. Examples of satisfactory evidence include a letter from the attorney or party who called the manager, or if such letter is not expeditiously obtainable, a letter from the manager, stating that the manager was called as a witness in the matter and did actually appear on the specified date(s) and, if issued in the matter, one of the following; a subpoena; court or administrative order; notice of deposition; or notice of examination before trial.

- A manger's unexcused tardiness, both upon arrival at work and upon return from a meal break, shall be charged to the manager's accrued annual leave balances. Only if the manger's accrued annual leave balances are exhausted may his or her pay be docked for unexcused tardiness, and then pay may be docked only to offset the actual amount of time missed through unexcused tardiness.

- A manager who has negative leave balances when he or she leaves City service may not have his or her pay or managerial lump sum payment docked to offset the negative leave balances.

(Def. Ex. V). This memorandum, similar to the 1986 memorandum, addressed all "agency heads."

Even if plaintiffs are correct that all agency heads are required to report to the Commissioner and can be addressed by a single memorandum, this does not lead to the conclusion that there is, in fact, a single city-wide policy directed specifically to managers of the various agencies sufficient to prove that the power to discipline the employee-managers rests solely with the City and not with each individual agency head. While the City Personnel Director, as the head of the Department of Personnel, formerly had the power to promulgate city-wide guidelines concerning discipline or codes of conduct, and the Commissioner of Citywide Administrative Services now has such power, neither has done so, presumably in recognition of the different needs and concerns of the particular agencies. (See Bibla Decl. P 5).

Moreover, under local law, the responsibility for employee discipline is vested in the head of each City agency who has the power to promulgate regulations concerning discipline, including standards of conduct, for the agency's employees. (New York City Charter §§ 387, 812(b), 389, attached as Def. Ex. T). Furthermore, while not all of the agencies have their own policies concerning codes of conduct and/or discipline, some, including the Fire Department and the Department of Sanitation, do have their own procedures. (Def. Mem. at 4; Def. Exs. F, P).

The Court of Appeals in Kelly v. City of Mount Vernon, considered whether the Mount Vernon Police Department should be treated "as a whole" when determining whether an actual practice of imposing disciplinary deductions existed with respect to a Detective Lieutenant, two Detective Sergeants, and a Sergeant. 162 F.3d at 769. The court refused to do so, noting that "the collective bargaining agreement dictating the terms of police officer pay clearly distinguished detectives as a

distinct police category." Id. Here, although there are many more agencies involved and no collective bargaining agreement, each agency must be considered separately because of the different rules applicable and the authority of each individual agency head over discipline in his or her agency. In reaching this decision, I also take into account that each case cited by plaintiff, where the court's review was not conducted on an agency-by-agency basis, was filed against either a local government entity or a small city with rules of city-wide applicability.

Here, the defendant is the City of New York which, as of December 31, 1991, oversaw forty-eight different agencies and employed 3,734 managers. (Godiner Decl. P 4; Def. Ex. A). Moreover, the Supreme Court remanded this action for a specific and limited inquiry as to the policies and practices of the various defendants -- an inquiry that necessarily requires a separate analysis for each defendant and each City agency. Accordingly, defendants' request to apply the Auer test on an agency-by-agency basis is granted.

B. Significant Likelihood of Deductions

A finding of a "significant likelihood" under Auer requires that the policy effectively communicate that deductions "will be made in specific circumstances." Ahern, 118 F.3d at 121 (quoting Auer, 519 U.S. at 461). In Ahern , the court found that the plaintiffs'

employment manual stated that the relevant deductions could be made from the salaries of employees in their class. They did not demonstrate, however, that the manual communicated that such deductions would in fact be made

in specified circumstances. In other words, the plaintiffs could not point to any rule that stated that if they committed a specific infraction, their pay would be docked. And this is what we read Auer to require.

Id. at 121-122 (emphasis added); see also Kelly, 162 F.3d at 769 (appellants not entitled to overtime compensation where, although Police Department's discipline policy nominally applied to all officers, there was no significant likelihood of deductions being applied to employees such as appellants); Lilenfeld v. Kiepper, 1997 U.S. Dist. LEXIS 15022, 1997 WL 607547, at *5 (S.D.N.Y. 1997) (Transit Authority managers were FLSA-exempt when there was only one instance of a non-safety-related deduction, and policy provided that a penalty of suspension without pay was "one of several options for a variety of infractions"); Marden v. Town of Bedford, N.Y.. 989 F. Supp. 500, 503 (S.D.N.Y. 1998) (Police Chief exempt where there was no evidence that disciplinary deductions had "actually" been made, and employment manual permitted suspension without pay as one "possible penalty" that was addressed to all officers, not just plaintiff's category), affirmed, 159 F.3d 1347 (2d Cir. 1998); Hoffman v. Sbarro, Inc., 982 F. Supp. 249 (S.D.N.Y. 1997) (summary judgment motion denied as premature because not enough discovery had been completed in order to determine how many employees were subject to reductions, the circumstances of such reductions, or over what period of time such deductions occurred).

Under Ahern, generalized manuals that do not specifically apply to plaintiffs' category of employment do not effectively communicate a substantial likelihood of impermissible deductions. 118 F.3d at 121. Thus, because none of the general written policies of the relevant City

agencies contains rules applicable only to managers mandating that if a manager commits a specific infraction, his or her pay will be docked, there is not a significant likelihood of improper disciplinary deductions. (See Def. Exs. C through Q). The same is true of the BOE and the HHC. (See Pl. Mem. at 26-27; PA 34, 35).

There are also a variety of other written policies and procedures which, although specific to managers, do not satisfy the Auer test. For example, HHC Operating Procedure Nos. 20-39, addressing "Managerial Decisions Affecting Group 11 Employees' Employment Status or Salary," dated November 12, 1986 (Def. Ex. S), was directed solely to managers. This policy clearly states, however, that an "adverse managerial decision" included "but [was] not limited to, demotion, suspension, dismissal, termination, or removal of authority or responsibility." In other words, it states that such deductions could be made but does not effectively communicate that such deductions "would in fact be made in specified circumstances." See Ahern, 118 F.3d at 121-122. Accordingly, this policy fails the Auer/ Ahern test.

The Department of Sanitation regulations relating to disciplinary suspensions are specific to the Department and vest the power to approve, modify or reject recommendations as to penalties in the agency head. (PA 27 at 11). Furthermore, the regulations list penalties that may be recommended and provide that "there is no precise formula that fixes the appropriate penalty to specific types of misconduct or incompetence." (PA 27 at 10). Not only does this manual further demonstrate that each agency makes its own rules and should be treated separately, but it also falls short of complying with the Auer/Ahearn test.

Another example is a reprint of a booklet discussing Executive Order 16 which requires all City workers to report to the Department of Investigation any conduct of fellow workers related to performance of their City duties or related to corruption, criminal activity or conflict of interest. (PA 26). This booklet, distributed to all City employees, does not specifically address those in plaintiffs' category, viz., managers, but applies "to all paid City workers, regardless of salary or rank, whether full-time, part-time, or per diem." (PA 26 at C.1).

Plaintiffs also argue that the written charges filed against employees, including managers, effectively communicate the available penalties that may be imposed on that manager. (See Pl. Mem. at 27-28). Plaintiffs' own language belies their argument and demonstrates that the charges relied on do not meet the standard set by Ahearn.

Finally, plaintiffs point to the changes to the "Leave Regulations for Management Employees" following Yourman I, which plaintiffs claim is "the most telling of defendants' actions." (Pl. Mem. at 24; see supra III. A.). In compliance with the Yourman I decision, the Jenkins Memorandum expressly prohibited disciplinary suspensions and fines as well as deductions for military leave and court attendance. It sheds no light on the penalties existing prior to the amended regulations or what the prior regulations effectively communicated. For all of the reasons stated above, I cannot find that plaintiffs have proffered any evidence that reveals an issue of fact as to whether there exists a significant likelihood of impermissible deductions.

C. Actual Practice

Defendants do not deny that in "extremely rare instances" managers received disciplinary penalties of deductions from pay or deductions from leave balances for infractions, other than safety rules of major significance, in weeks in which they had performed work. (Pl. 56.1 Statement P 56; Def. Admis. No. 9 at PA 3; PA 16 at 44). Because I do not find a significant likelihood of deductions, I must next address each of the deductions alleged to determine whether an actual practice of imposing disciplinary deductions existed.

The first question to resolve is what constitutes an actual practice of impermissible deductions. The Auer Court did not define "actual practice," except to hold that a single disciplinary deduction under unique circumstances was not enough to defeat the salaried status of all exempt employees. 519 U.S. at 462. While agreeing that one incident is insufficient to create an actual practice, courts in the post-Auer era have varied as to how many actual deductions are necessary to constitute an actual practice. See Kendall v. Davis, 1999 U.S. App. LEXIS 10786, No. 98-9512, 1999 WL 357851, at *2 (2d Cir. May 26, 1999) (two deductions insufficient to satisfy actual practice test); Digiore v. Ryan, 172 F.3d 454, 464-65 (7th Cir. 1999) (five pay deductions occurring under unusual circumstances did not constitute an actual practice); Carpenter v. City and County of Denver, Colo., 115 F.3d 765, 767 (10th Cir. 1997) (two pay deductions did not establish an actual practice); Davis v. City of Hollywood, 120 F.3d 1178 (11th Cir. 1997) (no violation where four deductions for less than one week periods occurred over eight years, and the City reimbursed employees and changed[its policy), cert. denied, 523 U.S. 1133, 118 S. Ct. 1827, 140 L. Ed. 2d 963 (May 18, 1998); Hoffman, 982 F. Supp. at 257, n.12 (six

improper deductions over an eleven-year period did not establish a pattern of improper deductions); Rushing v. Shelby County Government, 1997 U.S. Dist. LEXIS 23585, No. 95-2485- V, 1997 WL 901901, at *2 (W.D. Tenn. April 23, 1997) (at least seven deductions involving several employees in 1992 and 1995 constituted an actual practice); Arrington v. City of Macon, 973 F. Supp. 1467, 1471 (M.D. Ga. 1997) (actual deductions for 11 out of 39 plaintiffs constituted an actual practice).

Here, plaintiffs allege that 148 actual disciplinary deductions were made between 1980 and September 1993, some obviously long before the April 1986 applicability of the FLSA to local governments. This overstates the number of actual deductions for a variety of reasons. First, the relevant time period begins on April 1, 1989, the beginning of the applicable limitations period. Accordingly, no incidents prior to this date may be included as actual deductions.[2] Second, because each agency is considered as a separate entity, plaintiffs in non-Yourman agencies are irrelevant to the present motion and may not be included in the total number of deductions.[3] Third, plaintiffs have counted as an actual deduction each installment of a single fine and each week in which a partial week suspension extended. As discussed at oral argument, this penalizes defendants for an accommodation made to the individual employees, that is, spreading a single fine over a number of installments. Each fine, regardless of the number of

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[2] Accordingly, managers # 11, # 15, # 16, # 26, # 43, # 48 and # 54 are ineligible for inclusion in the total number of actual deductions.

[3] Thus, defendants may not reserve the right to make further submissions regarding the managers from non-Yourman agencies.

installments, reflects one decision to impose discipline based on a single course of misconduct and, accordingly, should be treated as a single fine. Similarly, if one incident caused a single suspension that happened to straddle two work-weeks, that single suspension should be counted as a single deduction. See DiGiore, 172 F.3d at 458 (holding that suspensions as to five sergeants, one of which spanned two work weeks, amounted to only five disciplinary deductions); but see Belcher v. Shoney's, 30 F. Supp. 2d 1010, 1020 (M.D. Tenn. 1998) (stating that defendant made 1,229 deductions spread over several years against 107 managers). Accordingly, after reducing plaintiffs' alleged deductions in the manner indicated above, the number of alleged deductions is much lower; twelve by the city agencies, three by the BOE and four by the HHC.

I now address each deduction to determine whether it was, in fact, impermissible. I reiterate that exemptions are to be narrowly construed against the employer which seeks to assert them, and the burden rests with the defendants to demonstrate that plaintiffs fall within the exception. See Arnold, 361 U.S. at 392. I find that defendants have clearly met their burden.

1. City of New York

There are fifteen city agencies which employed Yourman plaintiffs,[4] (Def. Ex. B), but only seven City

[4] The fifteen City agencies include the Department of Environmental Protection, Department of General Services, Department of Juvenile Justice, Department of Buildings, Department of Employment, Department of Health, Department of Personnel, Department of Transportation, Department of Parks and Recreation, Department of Housing Preservation and Development, Department of Human

agencies are alleged to have actually used suspensions or fines as a form of discipline for misconduct of managers within the relevant time period. (See Kiok Decl., Ex. A). Thus, the eight agencies where no actual suspensions or deductions occurred must be found to be exempt from the FLSA overtime compensation requirements. Those agencies are: the Department of Environmental Protection, Department of General Services, Department of Buildings, Department of Employment, Department of Personnel, Department of Parks and Recreation, Department of Probation and the Mayor's Office.

a. Department of Health- 93 managers[5]

Manager # 14,[6] an Associate Commissioner of External Affairs, was suspended for fourteen days for misusing his official position. He directed the reopening of a restaurant which had not yet resolved certain health code violations. (JA 14). Defendant claims this infraction falls under the exception to the salary basis test as a major safety violation. (Def. Mem. at 6; Def. 56.1 Responsive Statement P 5).

Resources Administration, Department of Probation, Fire Department, Department of Sanitation and the Mayor's Office.

[5] The number of managers indicated as employed by each agency, as well as the BOC and the HHC, is the number as of December 31, 1991. (See Def. Ex. A). Plaintiffs believe the numbers are significantly lower but state the dispute is not material. (Pl. Mem. at 13, n. 6).

[6] Pursuant to the stipulation and protective order, the names of the managers have been omitted. The numbers assigned to each correspond with the numbers in the sealed Joint Appendix which contain the documents relevant to each manager

The salary basis test provides that "penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status" and that "safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines . . . ." 29 C.F.R. § 541.118. The court in Avery v. Talladega, 24 F.3d 1337, 1341 (11th Cir. 1994), analyzed this regulation and held that "the FLSA regulations are not written to help promote discipline and public safety" but are restricted to consideration of "the employer's property and the safety of fellow employees instead of with public safety." Id.; see also Carpenter v. City & County of Denver, Colorado, 82 F.3d 353 (10th Cir. 1996), vacated and remanded , 519 U.S. 1145, 117 S. Ct. 1078, 137 L. Ed. 2d 213 (1997); Klein v. Rush-Presbyterian-St. Luke's Medical Ctr., 990 F.2d 279 (7th Cir. 1993) (rules relating to tardiness, rude behavior, and appearance were not safety rules of major significance); Shockley v. City of Newport News, 997 F.2d 18 (4th Cir. 1993) (same for rules punishing one's failure to report absences). Because I must construe exceptions to the FLSA narrowly and give substantial deference to the Department of Labor's ("DOL") interpretation of its own rules, I find that Manager # 14's act of reopening this restaurant, despite certain health code violations, falls short of the type of major safety violation contemplated by a plain reading of the statute. Accordingly, his suspension was improper. See Atlanta Professional Firefighters Union v. City of Atlanta, 920 F.2d 800, 804 (11th Cir. 1991). Because I conduct my analysis on an agency-by-agency basis, however, under Auer, a single disciplinary deduction is not enough to defeat the salaried status of an exempt employee. 519 U.S. at 462; see also Ahern, 118 F.3d at 121 (one incident is insufficient to create an actual practice). Accordingly, the Department of Health may utilize the window of correction to cure this

improper deduction and maintain the salaried status of Manager # 14.

b. Human Resources Administration - 986 managers

Manager # 35, Administrative Director of Social Services, was suspended without pay for thirty days for refusing to report to her new work location because she allegedly suffered from agoraphobia which, she claimed, was worsened when she traveled by bus or subway.[7] (JA 35). While there is no dispute that her new assignment was not within walking distance, it is unexplained why Manager # 35 could not have utilized a car service or taxi to reach her assignment which would have avoided triggering her ailment. In addition, she refused to take sick leave for her absence. (JA 35).[8] The regulations provide that "deductions may be made when an employee absents himself from work for a day or more for personal reasons, other than sickness or accident." 29 C.F.R. § 541.118(a)(2). Manager # 35 was later reinstated pursuant to a temporary restraining order and reimbursed pursuant to a settlement agreement. Defendant claims that, consistent with the salary basis test, she was suspended at the end of a week in

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[7] "Agoraphobia" means "an abnormal fear of being in crowds, public places, or open areas, sometimes accompanied by anxiety attacks." The Random House Dictionary of the English Language, Second Edition, Unabridged, p. 40

[8] Apparently Manager # 35 attempted to report to work on one day, claimed to have become ill before arriving and received paid sick leave for that day.

which she performed no work. (Def. 56.1 Responsive Statement P 20). Because Manager # 35 refused to take a sick day and was subsequently reimbursed, in light of the regulations above, this deduction does not violate the salary basis test. In any event, under Auer, a single deduction in this City agency is not enough to defeat the salaried status of an exempt employee. Also, as will be discussed in greater detail, infra, because there has been only one deduction by this agency, the window of correction was properly utilized by defendants. (See III.E., infra).

c. Department of Juvenile Justice - 20 managers

Manager # 20, Administrative Staff Analyst, received a reduction in pay in the amount of $6.25 for falsifying time records and leaving work without authorization or notification to his supervisors. He was reimbursed two weeks later. (JA 20). Defendant claims the reimbursement falls under the window of correction. (Def. 56.1 Responsive Statement P 9). As will be discussed below, because there was only a single deduction in this City agency the window of correction was properly utilized.

d. Department of Sanitation - 251 managers

Manager # 28, Director of Administration, received a non-payroll deduction for misappropriating Department supplies for personal use. He paid the fine by personal check. Plaintiffs argue that such compulsory fines are, in effect, a reduction in total compensation and should be included in the total number of actual deductions. (Pl. Mem. at 22).

The salary basis test precludes salary reductions based on "variations in the quality or quantity of work performed." § 541.118(a). Thus, defendants argue that because discipline for misappropriation of Department supplies was imposed for violation of a company policy attempting to control the use of company property, it was not based on the quality or quantity of the work performed and permissible. See Yuen v. U.S. Asia Commercial Development Corp., 974 F. Supp. 515, 523 (E.D. Va. 1997). Defendants' argument fails for several reasons. First, several courts have concluded that because an exception is available for safety rules of major significance, "reductions made for other types of rules constitute reductions based on the quantity and quality of an employee's work." Shockley, 997 F.2d at 24; see also Klein, 990 F.2d at 285; Hurley v. State of Oregon, 27 F.3d 392 (9th Cir. 1994); Abbey v. City of Jackson, 883 F. Supp. 181, 187 (E.D. Mich. 1995). Second, in Yourman I, I held that "theft of agency property" was an infraction for which plaintiffs would be subject to penalties. 826 F. Supp. at 739. Thus, a deduction for misappropriation of Department property is based on the quality or quantity of the manager's work and is prohibited. This particular incident, however, involved a fine, not a deduction from the employee's salary. Plaintiffs do not list this deduction as an impermissible deduction (see Kiok Decl., Ex. A), and I do not find that it violates the salary basis test.

Manager # 24, General Superintendent, was suspended without pay for nine days for failure to report to work. Pursuant to a written agreement, he was reimbursed for the nine days pay within three weeks of the suspension. (JA 24). He also agreed to waive any hearing right. Accordingly, because only one improper deduction as made and was subsequently corrected, the Department of Sanitation sufficiently maintained Manger # 28's salaried

status pursuant to the window of correction. (See III.E., infra).

e. Department of Transportation - 202 Managers

Manager # 31, Executive Director, Division of Parking, received a non-payroll deduction for misappropriating Department funds and personnel for personal use. He paid the fine by check. As stated above, a fine which is not deducted from the employee's weekly salary is not an impermissible deduction. Accordingly, the Department of Transportation committed no improper deductions.

f. Fire Department - 107 managers

Manager # 34, a Radio Repair Shop Manager, lost five days pay for misappropriation of Department funds for his own personal activities. (JA 34; Def. 56.1 Responsive Statement P 14). For the reasons stated above, this penalty was based on the quality or quantity of work performed. It is undisputed that Manager # 34 accepted the penalty and was required to make restitution. (Def. Mem. at 6; JA 34 at 002562, 002566). Defendant argues, however, that such penalties were lighter than the more severe sanctions the employing agency had the option of pursuing and that this constitutes a unique circumstance under Auer. (Def. Mem. at 26; JA 34 at 002561 (". . . the Department will institute disciplinary proceedings, and may seek to terminate you . . .")). The Court of Appeals for the Eighth Circuit defined a "unique circumstance" where, for example, "the sergeant in question, who had violated a residency rule, agreed to a reduction in pay as an alternative to termination of employment." Auer v. Robbins, 65 F.3d at 711. Although the Supreme Court recited this portion of the Court of Appeals opinion, it did not appear to adopt this definition

of a unique circumstance. In fact, the Supreme Court did not define this at all, and neither has any other subsequent court. Accordingly, I decline to read the Supreme Court as holding that every acceptance of a penalty is indicative of a unique circumstance. Instead, I find that acceptance of penalties and waiver of certain rights appears to be a normal procedure rather than one defined as unusual or unique.

Here, as to Manager # 34, it belies common sense to penalize the employer because of its own agreement to lower the penalty in the employee's favor. Even though the Supreme Court in Auer did not explicitly adopt the Eighth Circuit's definition of a unique circumstance, the Supreme Court nonetheless concluded that the city board was entitled to preserve the employee's exempt status by complying with the corrective provision. Accordingly, I too find that Manager # 34's salaried status may be so preserved.

Manager # # 32/33, an Account Manager, was fined ten days pay for being under the influence of alcohol while on duty and for being rude to members of the public. (JA 32). This penalty was agreed to in a written stipulation after years of supervisory conferences and attempts to counsel him and obtain help for his alcoholism. (Def. 56.1 Responsive Statement P 12; JA 32 at 002829). He was later suspended without pay for thirty calendar days for being intoxicated and rude to staff and the public. (JA 33).

Defendants assert that Manager # # 32/33 had a "unique and extraordinary" case in that he was an alcoholic and frequently intoxicated on the job. Plaintiffs argue that this manager's alcoholism is all too common and not unusual. (Pl. Reply Mem. at 20). I cannot agree that alcoholism is so prevalent that it is not considered unusual to have several incidents at work over the course of five

years requiring supervisory conferences, treatment and rehabilitation, disciplinary charges, demotions and suspensions. (JA 32). Accordingly, because the Fire Department committed only two impermissible deductions, albeit one unusual, it is entitled to utilize the window of correction and maintain the exempt status of Managers # 34 and # 32/33.

g. Department of Housing Preservation and Development - 155 managers

Manager # 17, Administrative Engineer, was suspended for approximately seven months in full-week increments but only reimbursed for part of that time. (JA 17). Because the suspension was in full-week increments, it was in compliance with the salary basis test.

Manager # # 18/19, Chief Project Development Coordinator, was fined for allegedly failing to file financial disclosure forms and for falsification of time records. (JA 18, 19). Manager # # 18/19 agreed to the penalty by written stipulation in lieu of termination which was initially recommended after the second incident. (JA 19 at 003515). Thus, defendant asserts this is an example of a unique circumstance. Whether this is a unique circumstance has been left open by the Supreme Court, and I decline to resolve that question. Because the Department of Housing Preservation and Development has made only one impermissible deduction, it may utilize the corrective provision set forth by the regulations.

In the alternative to the above analysis, even if I were to view all of the City agencies as one entity, as plaintiffs argue, and, for the sake of argument, assume that each of the alleged deductions discussed above was impermissible, there would be twelve deductions out of a workforce of 1,814 managers, roughly 0.7%. Under such an

analysis, I would find that number insufficient to establish an actual practice.[9] See Arrington, 973 F. Supp. at 1471 (held that actual deductions of 11 out of 39 plaintiffs, or 28%, constituted an actual practice).

2. BOE - 454 managers

Manager # 55, Associate Staff Analyst, was suspended for thirty days for not revealing his repeated off-duty incidents of sexual assault of a young girl when part of his job included supervising young boys and girls in a summer employment program. Following his conviction, Manager # 55 was sentenced to three years probation during which time he was forbidden to have unsupervised contact with adolescent girls. Defendants claim that the withholding of this information was not only a direct violation of the terms of his criminal sentence but also constituted a major safety violation in light of the implicit finding of the criminal court that unsupervised contact posed a potential danger to young girls. (Def. 56.1 Responsive Statement P 5, 23). While I find the conduct of Manager # 55 reprehensible, I cannot say that it falls within this exception because it does not pose a danger to the employer's property or the safety of fellow employees. Thus, this deduction was impermissible.

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[9] Although research has not disclosed a case where the percentage of impermissible deductions (as opposed to the number of such deductions) was expressly considered in determining whether an actual practice existed, such a consideration seems appropriate where large number of managers are involved. For example, three actual deductions in an agency of ten managers might show an actual practice while the same three deductions in an agency of three thousand managers might not.

Manager # # 57/58, a superintendent of a community school district, was fined one week pay for disciplinary reasons. This deduction is not impermissible because Manager # # 57/58 is not a covered employee under FLSA. He was appointed by elected officials and employed pursuant to a contract, thus not subject to civil service laws. (Def. 56.1 Responsive Statement P 24, 35). Section 203(e)(2)(C)(ii)(III) of Title 29 of the United States Code provides that individuals employed by state or local governments or agencies who are not subject to civil service laws and are appointed be elected officials "to serve on a policymaking level" are not employees. (Def. Ex. T). The same analysis applies to Manager # # 57/58's alleged non-payroll deduction, which is also, on its own, a permissible fine. Moreover, plaintiffs' counsel stated at oral argument that # 57/58 was not intended to be counted as an actual deduction but merely to serve as an example of the defendants' practice. Accordingly, the BOE committed only one impermissible deduction and may utilize the window of correction to maintain the exempt status of Manager # 55.

3. HHC - 3,708 managers

Manager # 42, Assistant Systems Analyst, a male, received deductions of four days' pay for making unwanted sexual overtures and physical advances towards other (female) employees, (JA 42), conduct which defendants claim constituted a major safety violation. (Def. 56.1 Responsive Statement P 5). Because I have found that the major safety exception is restricted to "the employer's property and the safety of fellow employees . . . ," Avery, 24 F.3d at 1341, I reject that argument. Although there is no question that sexual harassment of fellow employees is abhorrent behavior, it is not the kind of conduct covered by the statute as a major safety violation.

Manager # 49, Supervisors Systems Analyst, was suspended one day without pay but was later reimbursed, and his annual leave was reduced instead. (JA 49). Defendant claims that # 49's physically pushing his supervisor out of his office and slamming the door very hard constitutes a major safety violation. (Def. 56.1 Responsive Statement P 5, 27). For the same reasons as above, although physically pushing one's supervisor and slamming a door in the workplace is uncivilized and uncalled for, it is not the type of major safety violation covered by the statute.

Manager # 46, Senior Systems Analyst, was fined $258 for allegedly transmitting obscene messages intraoffice, and defendants claim that this conduct is also a major safety violation. (Def. 56.1 Responsive Statement P 5, 29). Once again, this does not constitute a safety violation encompassed by the statue, and, accordingly, is an impermissible deduction.

Manager # 53, Assistant Director of Human Resources, was suspended for three calendar days for disciplinary reasons relating to an adverse managerial decision. (JA 53). This suspension is inconsistent with the salary basis test.

Even though all four alleged deductions are impermissible, out of 3,708 HHC managers, four deductions constitute only 0.1%. This is not sufficient to amount to an actual practice of deductions. Accordingly, the window of correction may be utilized to correct these deductions and preserve the exempt status of Managers # 42, # 49, # 46 and # 53.

D. Other Deductions

Plaintiffs assert that Auer is not confined to disciplinary deductions but that consideration of "other" deductions was also included in the Supreme Court's remand. Although plaintiffs do not claim that the following policies should be included as actual deductions, they argue that they fall within the first prong of the Auer test, effectively communicating that deductions will be made under specified circumstances.

1. Late Filing Penalties

Plaintiffs argue that the penalties applied to managers requiring them to pay $100 fines for the late filing of financial disclosure statements and other disciplinary penalties (found in the City Personnel Policy and Procedure # # 707-89, 707-90 and 707-91) create a significant likelihood of deductions. (PA 36). The payment of late filing fees is neither a reduction in salary nor a form of discipline. Section 12-110 of the New York City Administrative Code requires public officials, not limited to managers, to file annual reports disclosing financial interests with the Conflicts of Interest Board. (Def. Ex. W, p. 104). For the reasons noted in section B, supra, the applicability of this requirement to employees other than managers precludes a finding that it creates a significant likelihood of deductions. See Ahearn, 118 F.3d at 121. Also, the late filing penalties are not deducted from the employee's salary but are paid directly to the Conflicts of Interest Board. (Def. Ex. W, p. 104; Def. Ex. X, pp. 12-13). Thus they are not impermissible deductions. Finally, the fine is not listed as a disciplinary penalty in the NYC Administrative Code § 12-110(h) and thus, cannot be considered a form of discipline.

2. Military Leave and Court Attendance

In Yourman I, I held that defendants' time and leave regulations, specifically applicable to managers, directly conflicted with the DOL regulations disallowing deductions for court attendance. I also found that defendants' limitation on paid military leave presented the "potential" for employees to take leave without pay. 826 F. Supp. at 742. Plaintiffs agree that no actual deductions have been made but argue that these policies fall within the second prong of the salary basis test. In light of the Supreme Court's decision in Auer, however, the mere "potential" for leave without pay is no longer sufficient to support a finding of a significant likelihood of deductions. Furthermore, plaintiffs have not provided any written policies with respect to military leave or court attendance which state a "clear and particularized policy . . . which 'effectively communicates' that deductions will be made in specified circumstances." Kelly, 162 F.3d at 770 (quoting Auer, 519 U.S. at 461). Accordingly, I find that the policies regarding military leave and court attendance do not violate the salary basis test under the new standard articulated by the Supreme Court.

3. Part-Day Docking

Plaintiffs criticize defendants for "leaping to the conclusion" that there were neither actual practices nor policies which created a significant likelihood of part-day docking. (Pl. Reply Mem. at 25). Plaintiffs have not, however, provided any evidence refuting defendants' statement. The only example of an actual deduction is Manager # 20 whose deduction was also disciplinary and, as discussed previously, was properly reimbursed pursuant to the window of correction. In arguing that the part-day docking policies fail the significant likelihood test, plaintiffs rely on Yourman I where I stated that the part-day

docking policy would be a sufficient basis to disqualify plaintiffs from being exempt, although I did not rely upon this determination in formulating my decision. 826 F. Supp. at 741, n. 8. But plaintiffs' own language belies their argument because they correctly state that the policy only created the "potential" for a deduction under the time and leave regulations. Under the Supreme Court's revised standard articulated in Auer, mere potential is no longer inconsistent with the salary basis test.

4. Annual Leave

Manager # 23, of the Department of Probation, was penalized one day of annual leave which was agreed to in a written stipulation. (JA 23). DOL opinion letters state that loss of annual leave does not violate the salary basis test (see DOL opinion letters at Def. Ex. U) and that deduction of leave is not pay-docking. See Graziano v. The Society of New York Hospital, 1997 U.S. Dist. LEXIS 15926, No. 96 Civ. 2716 (HB), 1997 WL 639026, *1 (S.D.N.Y. Oct. 15, 1997) (deferring to DOL opinion letters stating that leave deductions are consistent with the salary basis test, even where the employee could cash out unused leave). Accordingly, the Department of Probation did not violate the Auer test by deducting Manager # 23's annual leave.

E. Window of Correction [10]

The salary basis test provides for a "window of correction". When a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. 29 C.F.R. § 541.118(a)(6). The "plain language of the regulation sets out 'inadvertence' and 'reasons other than lack of work' as alternative grounds permitting corrective action." Auer, 519 U.S. at 463 (emphasis added). Thus, in Auer, even though the docking was intentional, the window of correction could be invoked because the employee had been docked for reasons other than lack of work. Id. "'Lack of work' refers only to the unavailability of work for the employee to perform, and not to an employee's failure to work." Kendall, 1999 WL 357851 at *2. Here, there is no dispute that each of the improper deductions found above were intentionally made. They were, however, made for reasons other than lack of work as defined by the Court of Appeals.

In Auer, the Court allowed the employer to use the window of correction to preserve the exempt status of the single employee who experienced a disciplinary deduction.

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[10] Plaintiffs claim that this defense is not properly raised because it was not asserted in defendants original answer dated August 9, 1991 and because defendants did not argue it before the district court prior to entry of judgment. The Court of Appeals, however, instructed me to "consider . . . the applicability of the corrective provision of 29 C.F.R. § 541.118(a)(6)" which I read as an instruction to consider the window of correction defense.

But the Court left unresolved the question of whether this option would be available if a court finds that an employer "engages in a pattern of improper deductions," (id.), or if the employer "has a settled policy of making improper deductions." Auer v. Robbins, 65 F.3d 702, 711 (8th Cir. 1995), aff'd, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)). Because I find that defendants did not have a pattern or a policy permitting deductions, I need not resolve this open question. I note that in her amicus brief filed with the Supreme Court in Auer, the Secretary of Labor explained in no uncertain terms that "respondents [could] correct the single disciplinary deduction of less than one week's pay." (Amicus Brief at PA 18, p. 15) (emphasis added). The language of the regulation, however, specifically states that even if more than a single deduction is made, the window is available if "the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. § 541.118(a)(6) (emphasis added).

In the DOL's amicus brief submitted in Klem v. County of Santa Clara, C-91-20674 (N.D. Cal.) (PA 19), the DOL clearly stated that the regulation did not support the argument that regardless of the number of deductions the window would be available. The DOL, however, did "not there propose what specific number of impermissible deductions for a class of employees is necessary to subject the pay of an employee within that class to reduction under the 'salary basis' test as set out in Auer. This is a factual determination best left to the trial courts."

Thus, while an unlimited window of correction would reduce the salary basis test to a minor procedural hurdle with no meaningful effect, I do not find that application of the window of correction in this case would have such an effect. On April 16, 1998, the Corporation Counsel for the City of New York, Michael D. Hess,

declared that "if the Court holds that any of the actions taken by defendants concerning their individual managerial employees were inconsistent with the salary basis regulations . . . then defendants will reimburse those individual employees." (Hess Decl. P2). Further, in response to the Yourman I decision, defendants clarified the policies for managerial employees to mirror FLSA exemption standards. Together, these actions provide ample evidence of a promise of future compliance. See Digiore v. Ryan, 987 F. Supp. 1045, 1056 (N.D. Ill. 1997), aff'd, 172 F.3d 454 (7th Cir. 1999). Accordingly, the window of correction is available in the instant case and may be used to reimburse managers # 14, # 34, # # 32/33, # # 18/19, # 55, # 42, # 49, # 46 and # 53 for the deductions they suffered which were not in compliance with the salary basis test and thus maintain each of the above managers' salaried status.

CONCLUSION

For the reasons set forth above, plaintiffs' motion to reinstate the judgment granting them summary judgment is denied, and defendants' cross-motion for summary judgment is granted. The Clerk of the Court shall mark this matter closed and all pending motions denied as moot.

SO ORDERED:

DATED: New York, New York

October 7, 1999

LORETTA A. PRESKA, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD YOURMAN, et al.,

Plaintiffs,

-against-

RUDOLPH GIULIANI, as Mayor of the City of New York, et al.,

Defendants.

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91 Civil 2197 (LAP)

JUDGMENT

Plaintiff having moved to reinstate the judgment granting them summary judgment and defendant having moved for summary judgment and the matter having come before the Honorable Loretta A. Preska, United States District Judge, and the Court on October 7, 1999 having rendered its Memorandum Order denying plaintiffs' motion to reinstate and granting defendants' motion for summary judgment, dismissing the complaint, and all pending motions are moot, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum

Order dated October 7, 1999, plaintiffs' motion to reinstate is denied and defendants' motion for summary judgment is hereby granted, all pending motions are denied as moot, and the case is closed.

Dated: New York, New York
October 13, 1999

JAMES M. PARKISON
Clerk of Court

By: /s/ JAMES FINNERAN
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1537, 1772 -- August Term 1995

Argued: May 1, 1996 Decided: May 31, 1996

Docket Nos. 95-7561, -7610XAP

HAROLD YOURMAN, RALPH BISHOP, WILLIAM H. DWORKIN, FREDERICK EWALD, JOHN L. HENDERICKSON, RICHARD KREPELA, ROBERT P. McCARTHY, FRANK MEYER, ANTHONY PUNZI, and RONALD L. SAVITT, on behalf of themselves and all other employees similarly situated,

Plaintiffs-Appellees-
Cross-Appellants,

v.

DAVID N. DINKINS, as Mayor of the City of New York, the NEW YORK CITY HOUSING AUTHORITY, the BOARD OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants-Appellants-
Cross-Appellees.

Before: NEWMAN, Chief Judge, FEINBERG and OAKES, Circuit Judges.

Appeal and cross-appeal from the May 12, 1995, judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, Judge) determining that municipal employees are entitled to overtime pay.

Affirmed on the opinions of the District Court, Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993); Yourman v. Dinkins, 865 F. Supp. 154 (S.D.N.Y. 1994).

Timothy J. O'Shaughnessy, Office of the Corporation Counsel, New York, N.Y., (Paul A. Crotty, Corporation Counsel, Kristin M. Helmers, Office of the Corporation Counsel, New York, N.Y.; on the brief), for defendants-appellants-cross-appellees.

Edward M. Scher, Asst. Atty. Gen., Albany, N.Y. (Dennis C. Vacco, N.Y. State Atty. Gen., Victoria A. Graffeo, Peter H. Schiff, Office of the N.Y. State Atty. Gen., Albany, N.Y., on the brief), for amici curiae State of New York.

Joan Stern Kiok, New York, N.Y. (Robert N. Felix, New York, N.Y., on the brief), for plaintiffs-appellees-cross-appellants.

(James E. Doyle, Atty. Gen., Richard Briles Moriarty, Asst. Atty. Gen., Wisconsin Dept.

of Justice, Madison, WI, submitted a brief for amicus curiae State of Wisconsin).

(Arthur A. Hartinger, Liebert, Cassidy & Frierson, San Francisco, Cal., Louise H. Renne, Jonathan V. Holtzman, Darren W. Lee, City Atty's. Office, San Francisco, Cal., submitted a brief for amici curiae National League of Cities, et al.).

(Richard Schoolman, Brooklyn, N.Y., submitted a brief for amicus curiae New York City Transit Authority).

(Richard E. Casagrande, Lisa M. King, Albany, N.Y., submitted a brief for amicus curiae New York State Public Employees Federation, AFL-CIO).

PER CURIAM:

This appeal presents an issue that continues to divide the federal courts: how to apply in the public sector the Department of Labor's "salary basis" test, which is used to determine whether employees are managers and consequently not covered by the wage and overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1994). Some courts have ruled that the "salary basis" test is not met and employees are therefore protected by FLSA requirements where their pay is subject to reduction, even if no reduction has occurred. See Carpenter v. City & County of Denver, [82 F.3d 353] (10th Cir. 1996); Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995); Barner v. City of Novato, 17 F.3d

1256, 1262 (9th Cir. 1994); Kinney v. District of Columbia, 301 U.S. App. D.C. 279, 994 F.2d 6, 11 (D.C. Cir. 1993); Michigan Association of Governmental Employees v. Michigan Department of Corrections, 992 F.2d 82, 86 (6th Cir. 1993). Other courts have ruled that the "salary basis" test is met and employees are therefore exempt from FLSA protections as long as no deductions from compensation have been made. See Auer v. Robbins, 65 F.3d 702, 711 (8th Cir.), petition for cert. filed, 64 U.S.L.W. 3428 (Dec. 7, 1995); McDonnell v. City of Omaha, 999 F.2d 293, 297 (8th Cir. 1993), cert. denied, 127 L. Ed. 2d 538, 114 S. Ct. 1188 (1994); Atlanta Professional Firefighters Union v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).

Appellants, the Mayor of New York City, the City's Board of Education, and its Health and Hospital Corp. (collectively, "the City"), appeal from the May 12, 1995, judgment of the District Court for the Southern District of New York (Loretta A. Preska, Judge), granting relief in the form of overtime pay under the FLSA to appellees, 435 of the City's supervisory employees ("the employees"). The City contends that the "salary basis" test, as applied to public employers, is irrational and violates the Administrative Procedure Act, 5 U.S.C. §§ 551-596 (1994), and also violates the Tenth Amendment. Alternatively, the City claims that its employees are not "subject to" reduction in pay, a criterion of the "salary basis" test, because (with one small exception), no reductions in pay have actually occurred. The City also claims a defense of good faith under the Portal-to-Portal Act, 29 U.S.C. § 259 (1994). The employees cross-appeal from that portion of the judgment that denied them straight time pay for hours worked between 35 and 40 hours per week.

In a thorough and thoughtful opinion, the District Court ruled that the City's express policies concerning deductions for discipline, court attendance, and temporary military leave placed the employees outside the managerial exemption. The District Court also reasoned that the employees were "subject to" pay reductions based on the City's express policies, and therefore that the City was liable to all employees in that classification, whether or not the policies had actually been applied. Finally, the District Court rejected the City's contention that the "salary basis" test, as applied, violates the Tenth Amendment and the Administrative Procedure Act, and also rejected the defense of good faith. Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993).

On the employees' cross-appeal, the District Court found in a separate opinion that the employees were not entitled to "gap time" pay because the parties' employment agreement contemplated that the employees' salary would compensate for all hours worked up to the overtime threshold, with a minimum of 35 hours per week. Yourman v. Dinkins, 865 F. Supp. 154 (S.D.N.Y. 1994).

Though the issues raised are important, no purpose would be served by adding further discussion to the dispute, already fully aired in the conflicting decisions cited above. We agree with the conclusions reached by Judge Preska in her comprehensive opinions, and leave the ultimate resolution of the statutory dispute to the Supreme Court or the Congress.

As to both the City's appeal and the employees' cross-appeal, we affirm on the opinions of the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOURMAN, et al.,

Plaintiffs,

- against -

DINKINS, et al.,

Defendants.

OPINION and ORDER

91 Civ. 2197 (LAP)

APPEARANCES:

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Loretta A. Preska, U.S.D.J.

Plaintiffs are employees of the City of New York (the "City"), the New York City Health and Hospitals Corporation (the "HHC"), and the Board of Education of the City School District of the City of New York (the "BOE") who have been designated as "managerial" employees by their respective employers. They bring this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 (1988), seeking unpaid overtime compensation at time and one-half their regular rate of pay for all hours worked in excess of forty hours each week. See 29 U.S.C. § 216(b).[1]

Additionally, plaintiffs whose regular work week is thirty-five hours seek overtime compensation at their regular rate of pay for all hours worked between thirty-five and forty hours each week pursuant to Administrative Code of the City of New York § 12-108.[2]

Before the Court are the parties' cross-motions for summary judgment. The Court finds, as each of the parties maintains, that no genuine issue as to any material fact concerning liability exists; the Court's task is therefore to apply the law to the facts before it. See Martin v. Malcolm

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[1] Plaintiffs also seek liquidated damages and reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 216(b) and declaratory relief pursuant to 28 U.S.C. §§ 2201-02.

[2] The Court has subject matter jurisdiction over this state claim pursuant to 28 U.S.C. § 1367.

Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992). As to the FLSA claim, the Court finds that plaintiffs are not exempt from the overtime compensation provisions of FLSA and therefore grants plaintiffs' motion and denies defendants' motion as to FLSA liability. As to the state claim, the Court finds that plaintiffs do not meet the requirements of § 12-108 and therefore grants defendants' motion and denies plaintiffs' motion as to that claim. Only the issue of damages under FLSA remains to be settled in this action.

I. Defendants' Time and Leave Regulations

Central to this action are the written time and leave regulations applicable to plaintiffs issued by the City ("City Regs."), the HHC ("HHC Regs."), and the BOE ("BOE Regs."). These regulations specify a minimum work week of thirty-five hours, and the City and the BOE regulations expressly require employees to work any additional hours and days necessary to carry out their responsibilities. City Regs. § 3.0; HHC Regs. § 1.0(B)(1); BOE Regs. § 4(a).[3] The regulations do, however, provide some flexibility for employees to vary, with supervisor approval, the hours worked on a given day in order to compensate for

[3] Plaintiffs in uniformed service, e.g., Administrative Fire Marshals and General Superintendents (Sanitation), work forty-hour weeks but are otherwise governed by the same regulations in all respects material to this action. None of the plaintiffs in uniformed service work in the New York City Police Department or in the New York City Correction Department, and the Court makes no findings in regard to employees of those departments in uniformed service.

unusually long hours worked in a certain period, two weeks for the City and the BOE and one week for the HHC. City Regs. § 3.0; HHC Regs. § 1.0(C)-(D); BOE Regs. § 4(b).

Pursuant to the regulations, employees must maintain time records reflecting their hours worked. City Regs. § 11.1; HHC Regs. § 1.0(A); BOE Regs. § 5; see Defs.' Resp. to Pltfs.' First Reg. for Admis. of Facts ("Defs.' Admis.") No. 10. The impetus for the institution of this action is plaintiffs' failure to receive any credit for time worked beyond the regular work week. See City Regs. § 6.0; BOE Regs. § 10(a).

As will be made clear below, critical to the determination of whether plaintiffs should receive overtime compensation under FLSA is an analysis of the circumstances under which deductions may be made by defendants from plaintiffs' compensation. Leave allowances provided by defendants to plaintiffs are important in this regard.

Plaintiffs accrue between twenty and twenty-seven days of paid annual leave allowance each year which can be used for vacation, personal business, or religious holiday leave. City Regs. § 4; HHC Regs. § 2.1; BOE Regs. § 8. Plaintiffs also accrue twelve days of paid sick leave allowance each year. City Regs. § 5; HHC Regs. § 2.2; BOE Regs. § 9. Use of annual leave allowance and sick leave allowance requires the approval of a supervisor and is measured by the hour for the City and the BOE and by the

half-hour for the HHC. City Regs. §§ 4.4, 5.3; HHC Regs. §§ 1.0(B)(3), 2.1(E), 2.2(C); BOE Regs. §§ 8, 9.[4]

Various scenarios exist under the regulations in which defendants may make deductions from plaintiffs' compensation. Employees are most clearly susceptible to pay deductions in instances where they have been absent from work yet have exhausted their leave allowances or have not received approval for use of leave allowances.[5] Additionally, defendants provide for a lump sum payment of unused accrued leave upon separation from employment. City Regs. § 7; HHC Regs. § 8.0; BOE Regs. § 14. Charges made against a leave allowance during employment may then be construed as deductions in pay to the extent any lump sum payment might be reduced accordingly.[6]

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[4] Additionally, supervisors have discretion to authorize limited use of a leave allowance before it is earned. City Regs. §§ 4.5, 5.4; HHC Regs. §§ 2.1(E), 2.2(C)(3); BOE Regs. §§ 8(f), 9(f). Under certain circumstances, supervisors also have the discretion to grant paid leave to employees who are absent due to personal illness and have exhausted their leave allowances. City Regs. § 5.5; HHC Regs. § 2.2(C)(4); BOE Regs. § 9(g).

[5] "[A] managerial employee could incur a deduction from pay for an absence of less than one work day, but only if the managerial employee has exhausted his or her leave balances. In addition, even if the managerial employee's leave balances are exhausted, the employee could avoid a pay reduction because the employing agency may advance the employee leave time to be earned in the future or may offset longer hours worked on other days during the same pay period." Defs.' Admis. No. 2; see id. No. 7 (similar); see also id. No. 3 (similar for deductions from leave allowance).

[6] While this argument equating charges against a leave allowance with deductions in pay is informative, the Court does not rely upon it to

Furthermore, a deduction in compensation may occur in connection with the calculation of a lump sum payment if an employee is found to have a negative leave balance upon separation from employment; in such a case, the employee might find her final paycheck reduced accordingly.

A review of defendants' treatment of the following items is particularly useful in evaluating plaintiffs' FLSA claim.

A. Part-Day Docking

As evident from the time and leave regulations, plaintiffs must account for each hour (for employees of the City and the BOE) or half-hour (for employees of the HHC) of their workweek. Plaintiffs basically must allot any such unit of time away from work to their annual leave allowance or sick leave allowance, offset it against unusually long hours worked at another time, or take leave without pay. Plaintiffs cannot, for instance, simply slip away from work for an hour in order to take care of personal business. In fact, the City and the HHC regulations expressly provide for charging unexcused tardiness against an employee's annual leave allowance or

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decide the instant motions. Cf. Abshire v. County of Kern, 908 F.2d 483, 487 n.3 (9th Cir. 1990) (declining to address whether employees subject to deductions would be salaried if the deductions were only from leave time and not base pay), cert. denied, 111 S. Ct. 785 (1991). But see Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1510 (S.D. Cal. 1992).

treating it as leave without pay. City Regs. § 4.6; HHC Regs. § 1.0(E).[7]

B. Disciplinary Penalties

Plaintiffs are subject to disciplinary penalties, including suspensions without pay of one to four days or deductions from leave balances, for infractions other than those of safety rules of major significance. Defs.' Admis. No. 8. Plaintiffs are subject to penalties for a variety of infractions including, for example, insubordination, abuse of sick leave, refusal to report for drug testing, conduct unbecoming, theft of agency property, and misuse of an agency car.

C. Court Attendance

Plaintiffs are authorized to attend court with pay and without using their accrued annual leave allowance if neither they nor anyone related to them has a personal interest in the case; the regulations specifically allow for paid leave in order for employees to attend court pursuant to a subpoena or court order. City Regs. § 8.0(c); HHC Regs. § 2.4(C). Thus, if one of the plaintiffs was absent from work in order to testify at a court proceeding in which she or someone related to her had a personal interest, the

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[7] Deductions for tardiness may also be viewed as disciplinary penalties, which are discussed immediately below. See Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279, 286 (7th Cir. 1993); Lacey v. Indiana State Police Dep't, 810 F. Supp. 244, 247 (S.D. Ind. 1992).

plaintiff would have to attempt to use her annual leave allowance, attempt to offset the time against unusually long hours worked at another time, or take leave without pay.

D. Military Leave

Plaintiffs may take military leave with pay for twenty-two work days or thirty calendar days each year. N.Y. Mil. Law § 242(5) (McKinney 1990) (incorporated into City Regs. § 8.1, HHC Regs. § 2.4(G), and BOE Regs. § 11). Beyond those periods, however, plaintiffs must seek to use their annual leave allowance, seek to offset the time against unusually long hours worked at another time, or take leave without pay.

II. Actual Deductions

Despite plaintiffs' vulnerability under the time and leave regulations to deductions from pay, actual deductions have rarely been made by defendants. In other words, plaintiffs appear for the most part to use their leave allowances or to account otherwise for absences rather than take leave without pay.

The parties dispute the extent to which deductions from pay have been made by defendants. Defendants contend that only two of the plaintiffs in this action have received such a deduction. The City did not pay John D. Brady for the last eight days of an approximately three-month period in 1991 while he was on active military duty; Brady had exhausted his annual leave allowance. In addition, the HHC penalized Vito LaBella for misconduct concerning the use of a computer system by, inter alia, deducting $258.00 from his pay.

In contrast, plaintiffs contend that approximately ten of them have received deductions in pay. Given the procedural posture of this matter, I will proceed to review plaintiffs' claims acknowledging only the two deductions in pay identified by defendants. As will be shown, the Court's holding does not depend upon the occurrence of any actual deductions in compensation.

III. The FLSA Claim

A. Overview

Initially, the Court notes that the Supreme Court has found the application of FLSA's overtime requirements to state and local governments to be constitutional. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Accordingly, plaintiffs appear at first glance to be entitled to overtime compensation under FLSA at one and one-half their regular rate for hours worked in excess of forty hours each week. 29 U.S.C. § 207(a). Plaintiffs' claim fails, however, if the statutory exemption to FLSA's overtime requirements applies to plaintiffs. 29 U.S.C. § 213(a)(1).

This exemption relieves employers from FLSA's overtime compensation provisions in the case of "any employee employed in a bona fide executive, administrative, or professional capacity as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1). Accordingly, the merits of plaintiffs' FLSA claim turn upon whether plaintiffs are "employed in a bona fide executive, administrative, or professional capacity."

Looking to the Department of Labor ("DOL") regulations, "executive," "administrative," and "professional" are defined in a manner such that plaintiffs fall within the exemption if they meet a duties test and are compensated for their services on a salary basis. See Martin, 949 F.2d at 613; Abshire, 908 F.2d at 484; 29 C.F.R. §§ 541.1-3. The parties have stipulated that the job duties of plaintiffs satisfy the requirements for exemption under § 213(a)(1). Accordingly, the FLSA claim may be reduced to the issue of whether plaintiffs are compensated for their services on a salary basis. If so, then plaintiffs come within the exemption of § 213(a)(1) and their claim under FLSA fails.

Before embarking upon an analysis of whether plaintiffs are paid on a salary basis, the Court notes that the exemption of § 213(a)(1) is to be narrowly construed and that defendants bear the burden of demonstrating that plaintiffs fall within the exemption. See Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 80 S. Ct. 453, 456, (1960); Martin, 949 F.2d at 614.

B. Discussion

According to the DOL regulations,

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a Predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work....

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation

> for loss of salary occasioned by both sickness and disability. . . .
>
> (4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. . . .
>
> (5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

29 C.F.R. § 541.118 (emphasis added).

1. Defendants' Time and Leave Regulations

Inspection of defendants' time and leave regulations in view of the DOL's definition of "salary basis" exposes several issues which persuade the Court that plaintiffs are not compensated on a salary basis. The Court specifically finds that plaintiffs' compensation is "subject to reduction because of variations in the quality or quantity of the work performed."

At the outset, the Court notes that plaintiffs must account for absences from work lasting less than a day as a result of defendants' measurement of a workday in hour or half-hour segments. From this manner of accounting, a plain inconsistency surfaces between the defendants' time

and leave regulations and the DOL's definition of "salary basis." The DOL regulations allow deductions for absences from work for a day or more for personal reasons or occasioned by sickness or disability. § 541.118(a)(2)-(3). A deduction for an hour or half-hour absence obviously is not "for a day or more," and the potential for a deduction from plaintiffs' pay for absences of less than one work day under the defendants' time and leave regulations therefore operates in direct conflict with the DOL regulations.

This variance in defendants' time and leave regulations from the DOL's definition of "salary basis" was recently condoned by new regulations issued by the DOL. These "special provisions applicable to employees of public agencies" allow employees of a public agency, such as plaintiffs, to qualify for the exemption of § 213(a)(1) despite the docking of pay "for absences for personal reasons or because of illness or injury of less than one work-day." 29 C.F.R. § 541.5d. Prior to the promulgation of § 541.5d, the conflict between the defendants' time and leave regulations and the DOL regulations would have signalled that plaintiffs were not compensated on a salary basis. See Martin, 949 F.2d at 615 ("[A]n employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee."); Whitmore v. Port Auth. of New York & New Jersey, 907 F.2d 20, 21 (2d Cir. 1990); Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 652 (2d Cir. 1983); U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986 (the "1986 letter ruling"). In

view of § 541.5d, however, the Court does not rely upon defendants' part-day docking of pay in order to disqualify plaintiffs from the exemption.[8]

Putting aside the issue of part-day docking, other obstacles prevent defendants from meeting their burden of proving the exemption under § 213(a)(1).[9] First, plaintiffs are subject to penalties for infractions of safety rules not of major significance. A more direct variance by defendants from the DOL regulations defining "salary basis" is difficult to fathom. See Shockley, 1993 WL 217491, at *5-6; Klein, 990 F.2d at 284-87; Lacey, 810 F. Supp. at 247-48; Service Employees Int'l Union, 784 F. Supp. at 1511; Pautlitz v. City of Naperville, 781 F. Supp. 1368, 1371-72 (N.D. Ill. 1992). Compare Defs.' Admis. No. 8 (admitting possibility of penalties for infractions other than those of

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[8] Notably, if the Court were to rely upon this part-day docking and not proceed to find other support for its finding that plaintiffs are not paid on a salary basis, § 541.5d would not shield defendants from all liability in this action. The part-day docking would be a sufficient basis to disqualify plaintiffs from the exemption under § 213(a)(1) for the relevant period preceding the promulgation of § 541.5d, See Shockley v. City of Newport News, Nos. 92-1790, 92-1800, 1993 WL 217491, at *3 (4th Cir. June 22, 1993); Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 84 (6th Cir. 1993). As the Court finds plaintiffs not to be paid on a salary basis regardless of the part-day docking, dissection of plaintiffs' claims over time in relation to the promulgation of § 541.5d is unnecessary.

[9] Section 541.5d only affected reductions for absences of less than one day for personal reasons or due to illness or injury and left "[a]ll other aspects of the salary test . . . unchanged." 57 Fed. Reg. 37671; 57 Fed. Reg. 37673.

safety rules of major significance) and 29 C.F.R. § 541.118(a)(5) (restricting penalties to infractions of safety rules of major significance).[10]

In addition, plaintiffs who are absent from work in order to testify at a court proceeding in which they or someone related to them has a personal interest may have to take leave without pay under the defendants' time and leave regulations. This directly conflicts with the DOL's regulations disallowing deductions from compensation for absences caused by attendance as a witness. 29 C.F.R. § 541.118(a)(4). Similarly, defendants' limitation on paid military leave presents the potential for employees on temporary military leave to take leave without pay; under

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[10] When the DOL issued § 541.5d, it explicitly declined to distinguish public employers from private employers in regard to the ability to make pay deductions as penalties under § 541.118(a)(5). 57 Fed. Reg. 37674. The Corporation Counsel for the City of New York, O. Peter Sherwood, acknowledged this distinction in his September 16, 1992 statement before the House of Representatives Committee on Education and Labor Subcommittee on Labor Standards ("Statement"). Statement at 11 ("[Section 541.5d] failed, however, to address the effect of other deductions from pay under the salary basis test, such as a deduction for a disciplinary violation."); cf. Shockley, 1993 WL 217491, at *6 ("The power to reduce an employee's pay [as a disciplinary sanction] for failure to report an absence is inherent in the power to reduce an employee's pay for part-day and full-day absences for personal reasons, both of which were permissible following promulgation of § 541.5d").

the DOL regulations, deductions may not be made for absences caused by temporary military leave. Id.[11]

The manifest discrepancies between the defendants' time and leave regulations and the DOL's definition of "salary basis" in regard to penalties and absences for attendance at court proceedings or due to military leave prevent defendants from meeting their burden regarding the exemption under § 213(a)(1).

2. "Subject to Reduction"

Defendants' primary response contends that something more than the theoretical imposition of pay deductions is required in order to disqualify plaintiffs from the exemption under § 213(a)(1), and actual deductions have only been made twice by defendants, in the cases of plaintiffs Brady and LaBella. Defendants would therefore have the Court fashion a standard by which plaintiffs and

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[11] Notably, plaintiffs are subject to deductions when they are absent for more or less than a day because of court attendance or military leave. As discussed above, docking of pay for absences of less than a day has been found inconsistent with compensation on a salary basis. See Martin, 949 F.2d at 615; Abshire, 908 F.2d at 486. The caselaw stating this principle appears specifically to concern absences for personal reasons or illness or injury under § 541.118(a)(2)-(3) (expressly allowing absences for "a day or more") and, as already related, has been nullified by § 541.5d as to public employees. As § 541.118(a)(4) addresses absences caused by attendance as a witness and temporary military leave and does not contain any language regarding the duration of the absence, the Court finds the deductions for absences as a witness or due to military leave at issue in this case to conflict with § 541.118(a)(4) regardless of the length of the absence.

other public employees would only be prevented from meeting the exemption where there have been actual "regular and recurring" deductions in compensation.

Defendants recognize the existence of two schools of thought regarding whether actual deductions from compensation are necessary prior to finding that employees fall without the § 213(a)(1) exemption. In support of the course exhorted by defendants -- that deductions in compensation must be actual and regular and recurring in order to remove employees from the exemption -- defendants rely upon a line of decisions originating outside the Second Circuit and upon an ambiguous paragraph found toward the end of the 1986 letter ruling.

As represented by defendants, courts outside the Second Circuit have held that something more than the possibility of a deduction in compensation is necessary in order to disqualify an employee from the exemption. See Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991) (pay not subject to reduction where no evidence of employees ever suffering reduction in pay); Harris v. District of Columbia, 709 F. Supp. 238, 241 (D.D.C. 1989) (refusing to rely upon "impermissible deductions [which are] less frequent than occasional"); District of Columbia Nurses' Ass'n v. District of Columbia, C.A. 87-1675, 1988 WL 156191, at *2 (D.D.C. January 28, 1988) (employees paid on salary basis where deduction "only in the occasional situation"); see also York v. City of Wichita Falls, Tex., 944 F.2d 236, 242

(5th Cir. 1991) (lack of evidence of docking of pay).[12] Contra Kinney v. District of Columbia, No. 91-71694, 1993 WL 179501 (D.C. Cir. June 1, 1993) (rejecting Harris and District of Columbia Nurses' Ass'n). Furthermore, the argument requiring "more than occasional" deductions appears to spring in part out of language contained in the 1986 letter ruling:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

In contrast to these authorities, numerous courts have held that employee compensation is "subject to reduction" under § 541.118(a) if a policy of the employer provides for deductions disallowed by the DOL regulations for salaried employees regardless of whether such deductions have been made. See Kinney, 1993 WL 179501, at *4; Abshire, 908 F.2d at 487; Banks v. City of North

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[12] Although defendants have cited York, the decision is not inconsistent with the cases reviewed below which favor plaintiffs' position that the existence of a policy of impermissible deductions meets the "subject to reduction" language of § 541.118(a). The York court recognized that it had no evidence before it of either actual deductions or a policy of docking pay. 944 F.2d at 242.

Little Rock, 708 F. Supp. 1023, 1025 (E.D. Ark. 1988) (no showing of actual deduction needed); Hawks v. City of Newport News, Va., 707 F. Supp. 212, 215 (E.D. Va. 1988) (employer's policy under attack under FLSA and whether policy has been applied does not alter policy itself); Persons v. City of Gresham, Or., 704 F. Supp. 191, 194 (D. Or. 1988) (immaterial that an instance of actual deduction not alleged); Knecht v. City of Redwood City, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) (lack of actual pay reduction does not alter analysis); see also Shockley, 1993 WL 217491, at *2-6 (focusing upon defendant's policy); Michigan Ass'n of Governmental Employees, 992 F.2d at 85-86 (focusing upon policy but, finding policy ambiguous, looking to application of policy). Moreover, courts have explicitly considered the impact of the enigmatic paragraph in the 1986 letter ruling upon their analysis and, in the opinion of the undersigned, correctly interpreted the 1986 letter ruling so that, although an occasional unpermitted deduction which is inadvertent or unintentional would not change an employee's salary status, the frequency of actual deductions is immaterial to finding employees' compensation "subject to reduction" where the employer has a policy allowing deductions for unpermitted reasons. Abshire, 908 F.2d at 488; Harrison v. District of Columbia, Nos. 87-0809, 87-2275, 88-1028 and 88-3223, 1991 WL 104260 (D.D.C. April 16, 1991); Knecht, 683 F. Supp. at 1311; cf. Banks, 708 F. Supp. at 1024-25 (letter ruling relied upon by defendant but not provided to court). But see Harris, 709 F. Supp. at 241; District of Columbia Nurses' Ass'n, 1988 WL 156191, at *2 n.1. Even if the cited paragraph from the 1986 letter ruling had the significance urged upon the Court by defendants, the "letter ruling cannot override the express provisions of a Department of

Labor regulation" in any event. Abshire, 908 F.2d at 488. In my opinion, "subject to reduction" when plainly read does not require actuality but intimates possibility and susceptibility and begs only the question of whether a policy exists under which a deduction may occur.

Furthermore, unambiguous material generated by the DOL seems to recognize that actual deductions are unnecessary before the exemption is lost. In its promulgation of § 541.5d, the DOL declined the suggestion of one commentator to "alter[] the regulations to require that an actual deduction of pay occur before the exemption is lost." 57 Fed. Reg. 37672. The DOL expressly found that requiring an actual deduction was inconsistent with the appropriate focus upon the pay system at issue. 57 Fed. Reg. 37673.

Despite defendants' presentation to the Court of these two lines of cases in a form suggesting that the issue of how to interpret "subject to reduction" is one of first impression in the Second Circuit, the Court of Appeals for the Second Circuit has unmistakably embraced the reasoning contained in Abshire that employee compensation is "subject to reduction" where a policy exists under which employees may be docked pay even though deductions have not actually been made. Martin, 949 F.2d at 615-17. Given the reliance in Martin upon cases concerning public employees, including Abshire, and the absence of language in Martin distinguishing the treatment under FLSA of private and public employees, I do not view the fact that Martin concerned private employees to make its holding inapplicable here.

Furthermore, I see no basis for distinguishing the proper interpretation of "subject to reduction" under § 541.118(a) depending upon whether a case concerns § 541.118(a)(2)-(3) as in Martin or § 541.118(a)(4)-(5) as in the instant case. Defendants concur on this point. Defs.' Mem. at 21. Notably, precedent exists under § 541.118(a)(5) -- separate from the cases already cited for the Abshire-Martin interpretation of "subject to reduction" -- that whether or not penalties have actually been imposed is immaterial to finding that compensation is "subject to reduction." See Klein, 990 F.2d at 286; Lacey, 810 F. Supp. at 248 n.1; see also Service Employees Int'l Union, 784 F. Supp. at 1511. But see Atlanta Professional Firefighters Union, 920 F.2d at 805 (where no evidence of actual deduction, employee exempt despite ordinance requiring decrease in compensation for arriving late or violating other regulations).

Finally, it should be noted that § 541.5d does not alter the Court's interpretation of "subject to reduction" under § 541.118(a). Although § 541.5d varies the analysis under § 541.118(a) in regard to when public employees' pay may be reduced "for absences for personal reasons or because of illness or injury of less than one work-day" and consequently overrules the holding of Abshire,[13] § 541.5d is silent as to the issue of whether "subject to reduction"

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[13] If Martin had concerned public employees, its holding would also have been overruled by § 541.5d. As to the Second Circuit's decisions in this area, § 541.5d appears to be at variance only with Whitmore.

requires an actual deduction to occur before an employee is no longer considered salaried under § 541.118(a). Accordingly, the Court disagrees with defendants' contention that § 541.5d overrules the interpretation of "subject to reduction" contained in Abshire and Martin.[14]

In view of the mandate to construe the exemption of § 213(a)(1) strictly, the Court finds that defendants have failed to meet their burden to demonstrate that plaintiffs fall within the exemption. Although § 541.5d prevents plaintiffs from being disqualified from the exemption based upon deductions for absences of less than one day of work, plaintiffs' compensation is "subject to reduction" for penalties not for infractions of safety rules of major significance and for absences caused by attendance as a witness or temporary military leave. Pursuant to § 541.118(a)(4)-(5), these deductions establish that plaintiffs are not paid on a salary basis and therefore are ineligible for the exemption from the overtime compensation provisions of FLSA.

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[14] The DOL is fully cognizant of the division of authority concerning whether "subject to reduction" under § 541.118(a) requires the existence of actual deductions in order to place an employee outside the exemption of § 213(a)(1). See 57 Fed. Reg. 37669. In asking this Court to require actual deductions, defendants in effect encourage the Court to embark upon a course which the DOL has, at least thus far, declined to follow. In view of Martin, the path on which this Court must travel is well-marked.

C. Defenses

Lastly, defendants assert three additional arguments in defense of plaintiffs' claim under FLSA which I shall briefly review.

1. Constitutionality

Defendants posit that Garcia establishes an "undue burden" test. Pursuant to the test put forth by defendants, lower courts are to issue relief where an undue burden exists as a result of failures by the political process to temper the effect of federal statutes upon state and local governments. Defendants' reading of Garcia is somewhat backward. Although the Court explores defendants' argument, the Court recognizes at the outset that its decision merely follows Garcia's holding that the application of FLSA to state and local governments is constitutional.

In Garcia, the Supreme Court found unworkable and inconsistent with established principles of federalism the traditional/nontraditional test which it had previously established in National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465 (1976), for determining state immunity under the Commerce Clause. Although the Supreme Court did discuss in Garcia "the built-in restraints that our system provides through state participation in federal governmental action," 469 U.S. at 556, 105 S. Ct. at 1020, it did not fashion an "undue burden" test or any other test. "Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in Garcia had no occasion to

identify or define the defects that might lead to such invalidation." South Carolina v. Baker, 485 U.S. 505, 512, 108 S. Ct. 1355, 1361 (1988).

I perceive absolutely no basis in this matter for finding "extraordinary defects in the national political process" under Garcia-Baker despite defendants' assertion that "the political process has broken down." Defs.' Mem. at 25; see State of New York v. United States, 942 F.2d 114, 119-21 (2d Cir. 1991), aff'd in part, rev'd in part, 112 S. Ct. 2408 (1992); EEOC v. State of Vermont, 904 F.2d 794, 802 (1990). To the extent that defendants complain about the political process, they focus upon the damages they face in this action -- which they view as an undue burden and a result of failures in the political system -- without pointing to any substantive defect in the political process itself. In other words, defendants emphasize effect and undue burden while turning a blind eye to cause and defects in the political process.

Having reviewed profuse submissions relating to revisions of the current law regarding the salary basis test, which involve, inter alia, the DOL, Congress, and state and local governments including defendants, it appears to me that the political process has operated proficiently despite the enduring existence of defendants' exposure to liability under FLSA. Indeed, the existence of § 541.5d and the redemption it affords in this very action to defendants' part-day docking policies provides concrete proof of the vitality of the political process. It remains to be seen whether the efforts of defendants and others in the political system can achieve what cannot be attained in this action -- the erasure of defendants' exposure to overtime compensation liability under FLSA in toto.

2. Administrative Procedure Act

Defendants' argument concerning the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 et seq. (1988), is greatly confused. In short, defendants appear to contend that failure to find plaintiffs to be compensated on a salary basis pursuant to § 541.118(a) violates the APA because of congressional intent that public employees qualify for the exemption under § 213(a)(1). Defendants provide no evidence of Congressional intent.[15] Defendants also contend that the DOL regulations are arbitrary and capricious in violation of the APA. In sum, defendants' arguments under the APA boil down to a restatement of their contention reviewed above that "subject to reduction" under § 541.118(a) should be interpreted to require actual deductions from employee compensation. Dressed under the APA, defendants' argument still fails.

3. Defendants' Good Faith

Defendants' last defense asserts that they are entitled to a good faith defense under § 10 of the Portal-to-Portal Act (the "Portal Act"), 29 U.S.C. § 259 (1988),

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[15] Defendants seek to infer congressional intent from statements made by the DOL. Rather than delineate congressional intent, these citations illustrate the potential for revision of the DOL regulations as a result of the political process and the fact that grey areas exist as to what categories of employees should be exempt from FLSA's overtime compensation provisions. Cf. Kinney, 1993 WL 179501, at *3 (noting interaction between the DOL regulations and congressional intent).

which provides that "no employer shall be subject to any liability [under FLSA] if he pleads and proves[16] that the act or omission complained of was in good faith and in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation [of the DOL] or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged."[17]

Initially, I note that defendants elaborate upon evaluations of FLSA's overtime compensation provisions made by them in the "Citywide Fair Labor Standards Act Committee" and in consultation with internal and outside

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[16] Defendants did assert a Portal Act defense in their answer as an affirmative defense. However, I discern no disputed material fact and find the defense deficient as a matter of law drawing all reasonable inferences against plaintiffs. See Quinn v. New York State Elec. & Gas Corp., 621 F. Supp. 1086, 1089 (N.D.N.Y. 1985) ("summary judgment has been found to be an appropriate tool to dispose of cases involving a Portal-to-Portal Act defense"); see also EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982) (summary judgment rarely appropriate where state of mind is material issue); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658 (4th Cir. 1969) (affirming grant of summary judgment for plaintiff where defendant asserted a Portal Act defense).

[17] The Portal Act defense requires the employer to establish three interrelated elements:

> (1) that its action was taken in reliance on a ruling of the [DOL], (2) that it was in conformity with that ruling, and (3) that it was in good faith.

Home Ins., 672 F.2d at 263; see also 29 C.F.F. §§ 790.1-.22 (DOL interpretation of the Portal Act).

counsel. Unless connected to a "written administrative regulation, order, ruling, approval, or interpretation" of the DOL, however, these evaluations are irrelevant under the Portal Act. See 29 C.F.R. § 790.13. Similarly, meetings with the DOL have no bearing upon the defense in the absence of a writing by the DOL. Although I have taken these consultations into account in my examination of the written materials upon which defendants claim reliance, I nevertheless find defendants' assertion of a Portal Act defense to fail.

The 1986 letter ruling is the first written material claimed by defendants to support a Portal Act defense in this action. As already discussed, however, this letter ruling does not sustain defendants' time and leave regulations (1) because it does not disqualify public employees from exemption under § 213(a)(1) where the employer has a policy allowing deductions for unpermitted reasons and (2) because the letter ruling in no manner overrides the plain "subject to reduction" language of § 541.118(a). See Abshire, 908 F.2d at 488; see also Harrison, 1991 WL 104260; Knecht, 683 F. Supp. at 1311. Furthermore, even if the 1986 letter ruling is viewed as requiring actual deductions to occur before exemption is lost, the letter ruling concerns deductions made for absences of less than one day and not deductions for court attendance as a witness, temporary military leave, and penalties not for

infractions of safety rules of major significance -- the deductions which create the basis for liability in this case.[18]

Defendants also refer to a 1987 DOL letter ruling which stated a DOL nonenforcement policy in regard to deductions from public employees' compensation made for absences of less than a day for personal reasons or because of illness or accident; this letter ruling reflects part of the genesis of § 541.5d. U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 9, 1987 (the "1987 letter ruling"). As with the 1986 letter ruling, the 1987 letter ruling does not support a Portal Act defense because it does not speak to the types of deductions at issue in this action.[19] In his statement before Congress, the Corporation

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[18] Decisions which find that actual deductions are not required in order to disqualify employees from the exemption under § 213(a) have in fact cited the 1986 DOL letter ruling for its holding that deductions for absences of less than a day are disallowed under § 541.118(a)(2)-(3) for salaried employees. Hawks, 707 F. Supp. at 214; Knecht, 683 F. Supp. at 1311.

[19] Even as to the part-day docking addressed in the 1987 letter ruling, applicability to defendants is doubtful. The 1987 letter ruling, by its terms, applies "only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments [for absences of less than a day]." In their support, defendants cite the New York constitutional prohibition against municipal gifts of money or property to individuals. N.Y. Const. art. VIII, § 1. This constitutional provision does not, however, require defendants to deduct pay from plaintiffs for absences of less than a day. See Abshire, 908 F.2d at 489-90; see also City of Amsterdam v. Local 2825, Amsterdam Professional Firefighters, 494 N.Y.S.2d 180 (N.Y. App. Div. 1985); Taylor v. McGuire, 420 N.Y.S.2d 248 (N.Y. Sup. Ct. 1979).

Counsel of the City of New York explicitly recognized that the 1987 letter ruling does not deal with penalties, attendance as a witness, and temporary military leave. Statement at 9. In addition, the 1987 letter ruling expressly states that it does not shield defendants from suits by employees, such as the instant action. See Kinney, 1993 WL 179501, at *1, *6; see also 57 Fed. Reg. 37668 (noting nonenforcement policy's inapplicability to employees in connection with the Portal Act).

Furthermore, "the Portal Act language, 'in good faith in conformity with,' precisely links the question of good faith to an act in conformity, and if there is no conformity, general good faith in other respects cannot save the day." Home Ins., 672 F.2d at 265. The material parts of defendants' time and leave regulations were in existence prior to the 1986 letter ruling. Defendants took no action "in conformity with" the 1986 letter ruling or the 1987 letter ruling, except for attempts to determine whether actual deductions had been made under their regulations. If defendants viewed the 1986 letter ruling and the 1987 letter ruling to require actual regular and recurring deductions in compensation before exemption would be lost, affirmative conforming action would be expected from defendants, such as the issuance of regulations to restrict actual deductions.[20] Especially in view of the fact that neither

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[20] In Service Employees Int'l Union, defendant amended its ordinance so that "salaried" employees would not be subject to docking for periods of absence of less than one day. 784 F. Supp. at 1510. Plaintiffs have submitted evidence demonstrating a similar measure by the New York City Transit Authority. Kiok Decl. Ex. D. Obviously, this precise

letter ruling speaks to pay deductions for penalties, court attendance, or military leave, it is clear that defendants could not have relied upon the letter rulings for the maintenance of the time and leave regulations. See 29 C.F.R. § 790.14(b) (lack of conformity where employer assumes irrelevancy of varied circumstances).

Defendants essentially contend that they should not be found liable because of the flux surrounding FLSA's overtime compensation provisions for public employees after Garcia. The fundamental problem with this argument is that it effectively blocks public employees such as plaintiffs from receiving relief under FLSA until the political process irons out all of the wrinkles caused by the application of FLSA to public employees. Any uncertainty resulting from these political travails cannot form the basis for a portal Act defense.

> The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall

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concern has been ameliorated by § 541.5d, but similar amendments could cure the other impermissible deductions in defendants' regulations. For instance, in Klein, defendant amended its disciplinary procedures so that no pay deductions would occur other than for infractions of safety rules of major significance. 990 F.2d at 282.

> apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. Vol. 93, part 4, Cong. Rec. 4390.

Quinn, 621 F. Supp. at 1091 (citing legislative history in connection with 29 C.F.R. § 790.15(a)).

Moreover, the shifting waters regarding FLSA's applicability to public employees post-Garcia have not been unnavigable. The first decision to require actual deductions in compensation for liability under FLSA, of which the Court is aware, was the 1988 decision District of Columbia Nurses' Ass'n; Knecht, issued in 1987, was the first decision, of which the Court is aware, to find that the absence of an actual deduction did not preclude FLSA liability. In view of the fact that defendants' time and leave regulations provided for the imposition of deductions in compensation prior to these decisions, defendants should not have merely stayed their course but should have shifted direction so that actual deductions would not be made until the debate was settled. See Kinney, WL 179501, at 6 ("split in judicial decisions" not reasonable basis for defendant's policy); 29 C.F.R. 790.17(h) (regulation, order, ruling, approval, or interpretation relied upon by employee must be valid at time of reliance).

In sum, plaintiffs should not be subject to a cut in pay because of defendants' misgivings about the political process. The Portal Act was not designed to protect defendants under the circumstances before the Court.

> Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the

> Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.

29 C.F.R. § 790.2(a). Defendants' course of relief lies with the political process and/or modification of their time and leave regulations; Plaintiffs' course of relief lies with this action against defendants.[21]

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[21] Another district court recently summarized the situation quite succinctly:

> This area of the law is currently churning, and federal courts issue often contradictory opinions on a daily basis. [Section 541.5d] only begins to address the types of problems faced by local governments because of their negligence (or unwillingness) to bring their policies into line with the FLSA, but we decline to extend the reach of [§ 541.5d's] forgiveness too far beyond its language. At some point public sector employers must be held to answer for their conduct.

Pautlitz, 781 F. Supp. at 1374.

IV. State Claim

As previously stated, plaintiffs' state claim asserts that plaintiffs whose regular workweek is thirty-five hours should receive overtime compensation at their regular rate of pay for all hours worked between thirty-five and forty hours each week pursuant to Administrative Code § 12-108.[22] Plaintiffs, however, point to no "statute, general, special or local" establishing thirty-five hours each week as "the maximum number of hours of employment;" accordingly, plaintiffs' state claim fails. I find plaintiffs' contention that § 12-108 can only reasonably be construed to provide overtime compensation for hours worked beyond an employee's regular workweek to be disingenuous in view of the unambiguous language of the statute. Cf. Corp v. Alexander, 460 N.Y.S.2d 674 (N.Y. App. Div. 1983) (plaintiff not fireman with statutory maximum of hours per year that may be worked).

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[22] Notwithstanding the provisions of any other statute, general, special or local, the mayor may authorize the head of any agency to require any officer or employee in such agency or any class or group of officers or employees in such agency to work in excess of the maximum number of hours of employment prescribed for such officer or employee or class or group of officers or employees by any statute, general, special or local, provided that each such officer or employee shall be paid overtime compensation for such work at not less than his or her regular basic pay rate.

V. Conclusion

The Court finds that plaintiffs are entitled to unpaid overtime compensation for all hours worked in excess of forty hours each week under FLSA. The exemption under § 213(a)(1) does not apply to plaintiffs because they are not compensated on a salary basis according to the DOL regulations and controlling caselaw. This finding emanates from the defendants' time and leave regulations which subject plaintiffs' compensation to reduction for absences caused by attendance as a witness and by temporary military leave and for penalties not for infractions of safety rules of major significance. Plaintiffs' state claim fails because plaintiffs have failed to identify any statute which sets thirty-five hours each week as the maximum number of hours of employment.

Counsel for the parties shall appear at a conference before the Court on August 5, 1993 at 4:30 p.m. in order to address how to proceed in regard to the damage phase of this action.

SO ORDERED.

Dated: New York, New York
July 12, 1993

/s Loretta A. Preska
Loretta A. Preska, U.S.D.J.

Letter Ruling: January 15, 1986 (no number assigned)

This is in response to your letter of July 30, with enclosure, in which you request our opinion as to whether ___ Counties, in the State of _____ are compensating their salaried employees "on a salary basis" that is in accordance with the salary requirement contained in section 541.118 of Regulations, 29 CFR Part 541. You specifically want to know whether, under section 541.118, deductions may be made from the salaries of such employees for absences of less than a day. We regret the delay in responding to your inquiry.

Your letter states that in ____ counties virtually all employees are paid on a salary basis. The employees earn sick leave under the sick leave plans of those counties, and use the sick leave on the basis of the hours they work. In a telephone conversation with a member of my staff on October 20, you clarified your inquiry by stating that you request our opinion with regard to the salary basis of payment for employees who would otherwise qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) as bona fide executive, administrative, or professional employees.

You state that where a salaried employee has accrued sufficient sick leave credits and, for example, misses four hours of scheduled work because of illness, the employee is charged for four hours of sick leave and his or her compensation is not affected. However, if such employee has exhausted all earned sick leave and misses four hours of scheduled work because of illness, the employee is docked for the four hours and his or her pay is reduced accordingly. You indicate that it may not be

possible under ___ State law to advance sick leave to employees. You believe that other States have similar problems in paying such employees their full salaries when they work partial days.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive administrative, or professional capacity as those terms as defined in the appropriate sections of Regulations, 29 CFR Part 541. One requirement for exemption is that the employee be paid "on a salary basis" as discussed in section 541.118.

Deductions which may be made from an employee's compensation without affecting the employee's salary basis of payment are found in sections 541.118(a)(2), (3), and (5). Deductions from the salary of an otherwise exempt employee which would affect the salary basis of payment are found in sections 541.118(a)(1) and (4).

As stated in section 541.118(a)(2), deductions may be made from the salary of an exempt employee when the employee is absent from work for a day or more days for personal reasons, other than sickness or accident. As stated in section 541.118(a)(3), deductions may also be made for absences of a day or more days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice or providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy, or practice provides compensation for such absences, deductions for absences of a day or more days may be made before an employee has qualified under such plan, policy, or made before an employee has qualified

under such plan, policy, or practice and after the employee has exhausted the leave allowance thereunder. However, deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or from sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3).

Therefore, in the example you provide where the employee is docked four hours and his or her pay is reduced accordingly, because the employee has exhausted his or her sick leave, the employee would not meet the criteria under 29 CFR Part 541 for exemption under section 13(a)(1) of FLSA.

Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

The Fair Labor Standards Amendments of 1985 (Public Law 99-150), which were enacted on November 12, 1985, change certain provisions of FLSA as they relate to employees of State and local governments. The amendments will be effective on April 15, 1986. Prior to that date, the Department of Labor (the Department) will issue regulations as may be required to implement this legislation. We have enclosed a summary of these amendments for your information.

We also wish to point out that on November 19 the Department published an Advance Notice of Proposed Rulemaking in the Federal Register (50 FR 47696) to obtain the views of the public on needed changes in Regulations, 29 CFR Part 541. The Department is interested in the views of the public with respect to all aspects of the regulations. Comments will be received until January 21, 1986.

We trust the above information will be of assistance to you.

Sincerely,

/s/ Herbert J. Cohen
Deputy Administrator

JULY 17, 1987 LETTER RULING

Letter Ruling: July 17, 1987 (no number assigned)

This is in response to your letter of May 26 enclosing correspondence from ____ Secretary of the State of ____ Department of Employment Relations. ____ is specifically concerned with the application of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) to bona fide administrative and professional employees employed by the State of _____.

____ asks to what extent the State of ____ can require exempt administrative and professional employees, when they participate in collective bargaining activities, to substitute paid or unpaid leave for the time spent in such activities without affecting their status as exempt salaried employees. _____ states that it has generally been the position of the State of _____ that its employees who are members of their unit's bargaining team must cover time spent in bargaining during their normal working hours with paid leave time (i.e., vacation, compensatory time, etc.) or leave without pay. Bargaining sessions commonly take place over a period of a normal workday, but there are times in which the bargaining may last only a portion of a workday. In addition, bargaining sessions may last several days at a time but may not last a full workweek.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under FLSA must be paid a minimum of $3.35 per hour and overtime pay of not less

than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek, unless specifically exempt.

Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in Regulations, 29 CFR Part 541, a copy of which is enclosed. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the regulations.

It is our general position that time spent in union negotiations is hours worked for purposes of FLSA if the time occurs during regular working hours (section 785.42 of Interpretative Bulletin, 29 CFR Part 785, copy enclosed). Where time spent in union activities is to be counted as hours worked under FLSA, deductions from the salaries of bona fide administrative or professional employees would be inconsistent with the salary basis of payment and may not be made without defeating the exemption. Where the time spent in such activities during the employee's absence from productive work is not counted as worktime for the employer, deductions for such absences would come within the intent of the rule explained in section 541.118(a)(2) of the regulations which provides that deductions may be made when an employee absents himself or herself from work for a day or more (days) for personal reasons other than sickness or accident. Deductions for absences of less

than a day, however, are not permitted under the regulations for any reason.

Based on the above, constitutents's questions are answered in the order presented in his letter.

Q.1

To what extent may an employer require an exempt administrative or professional employee who chooses to engage in collective bargaining activities during the workday to substitute a partial day's paid leave or unpaid leave (i.e., a salary deduction) for the time spent in such activities without the employee losing his or her exempt status?

A.1

Generally, deductions for absences of less than a day are not permitted under the regulations for any reason. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week. In the case of State or local government employees, deductions may be made for absences of less than a day for personal reasons if the conditions outlined in the enclosed memorandum of January 9, 1987, are met.

Q.2

To what extent may an employer require an exempt administrative or professional employee who chooses to engage in collective bargaining activities, such as contract negotiations, to substitute a full day or more (days) of paid or unpaid leave (i.e., a salary deduction of a full day or

more (days) for a full day or more (days) spent in such activities) without the employee losing his or her exempt status?

A.2

Where the time spent in collective bargaining activities during the employee's absence from productive work is not counted as hours worked under FLSA, deductions for such absences would be permissible from the salary of an otherwise exempt employee for a full day or more (days) without the employee losing the exemption for that week.

Where such time is counted as hours worked under FLSA, deductions from the salary of an otherwise exempt employee for a full day or more (days) would be inconsistent with the employee's exempt status and may not be made without defeating the exemption. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week.

Q. 3

To what extent may an employer pay an administrative or professional employee on an hourly basis rather than a salary basis during the workweeks in which the employee chooses to engage in collective bargaining activities and pay the employee on a salary basis for all other workweeks in which the employee's exempt status during the workweeks in which the employee is paid on a salary basis? ____ states to assume that the employee engages in collective bargaining activities for

approximately 7 weeks over a 2-year period and that the employee would be paid as a nonexempt employee during these workweeks.

A.3

An employer may pay an otherwise exempt employee on an hourly basis rather than on a salary basis during workweeks in which the employee chooses to engage in collective bargaining activities.

It is our opinion that, although the employee would be considered a nonexempt employee during those weeks when paid on an hourly rate basis, it would not affect the employee's exempt status in other weeks when the employee is paid on a salary basis.

It should be noted that it is also our position that an employee whose salary is computed on an hourly rate basis will be considered as employed "on a salary basis" if he or she is guaranteed a salary which is at least equal to the salary prescribed in the appropriate section of Regulations, Part 541, and if there is a reasonable relationship among the hourly rate, the regular or normal working hours, and the amount of the weekly guarantee.

Letter Ruling: December 24, 1991 (no number assigned)

You will recall that at your ____ meeting lat summer, I promised to provide your organization with an explanation of the effect of disciplinary deductions under Regulations, 29 CFR Part 541. I regret the delay in providing this information- but think that you will still find it useful.

As I explained in my remarks, the only deductions which may be made from an employee's compensation without affecting the "salary basis" of payment are found in §§ 541.118(a)(2), (3), and (5) of the Regulations (copy encloseed). The only discipline related deduction pemissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance". As explained in §541.118(a)(5), safety rules of major significance embrace those- intended to prevent serous danger to the facility or other employees, including prohibitions against smoking in explosive plants, oil refineries, and coal mines. The Department of Labor has also construed this language to cover penalties imposed for violations of industrial security regulations promulgated by the Department of Defense.

The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in §541.118(6). Where a one-time disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks *if* the employer reimburses the employee for such deduction *and* agrees to not take any such impermissible deduction in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g., because of an employer's policy), we would question whether such employees, including all those in the "class" or "category" of employees affected by such deductions, are actually paid

on a salary basis and the exemption may be denied in *all* workweeks.

I would again emphasize that these rules are not intended, and should certainly not be construed, to prevent employers from taking appropriate disciplinary action with respect to their employees. Rather, these rules effect a long-standing interpretation of employment practices that typically distinguish thos employees who are paid "on a salary basis" from those who are not. That is to say that those employees who are paid "on a salary basis" are not generally subject to disciplinary action that results in deductions from their salary, but are and can be appropriately disciplined in other ways.

I trust the above discussion fulfills my commitment. Please let me know if you have any further questions in this matter.

/s/ John R. Fraser
Acting Administration

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Tenth Amendment, United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fair Labor Standards Act

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.

1. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regualr rate at which he is employed.

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 U.S.C. §§ 206, 207] shall not apply with respect to--

2. any employee employed in a bona fide executive, administrative, or professional capacity

(including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act ...) ....

Title 29, Code of Federal Regulations

§ 541.1 Executive.

The term employee employed in a bona fide executive * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

* * *

(f) Who is compensated for his services on a salary basis ....

§ 541.2 Administrative.

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

* * *

(e) (1) Who is compensated for his services on a salary or fee basis ....

§ 541.3 Professional

The term employee employed in a bona fide * * * professional capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes, or

* * *

(e) Who is compensated for services on salary or fee basis . . .

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be

disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because--

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

§ 541.118 Salary basis

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his

compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any work-week in which he performs no work.

* * *

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability ....

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as

rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(2)

Supreme Court, U.S.
FILED
FEB 15 2001
CLERK

No. 00-1235

IN THE

Supreme Court of the United States

RUDOLPH GIULIANI,
Mayor of the City of New York, *et al.*,

Petitioners,

v.

HAROLD YOURMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should *certiorari* be granted where the Court of Appeals remanded the case to the district court "for further proceedings not inconsistent" with its opinion and those proceedings could result in a victory for the petitioners?

2. Should *certiorari* be granted to decide whether the application of the salary basis test to local government employees violates the Tenth Amendment where that issue was not argued to or decided by the Court of Appeals?

3. Should *certiorari* be granted to determine the application of the window of correction where there is no real conflict in the decisions of the courts of appeals and the petitioners urge an interpretation that is contrary to that of the Secretary of Labor?

STATEMENT OF THE CASE

The facts relevant to this petition are stated in the opinion of the Court of Appeals, *Yourman v. Giuliani*, 229 F.3d 124, 126-127 (2d Cir. 2000). Because the petitioners make a number of misstatements of fact and law, respondents, pursuant to Rule 15.1, takes this opportunity to address those misstatements.

Many of the issues raised by petitioners in their statement of the case were decided by this Court in *Auer v. Robbins*, 519 U.S. 452 (1997). Thus, *Auer* held that the salary basis test as interpreted by the Department of Labor was reasonable including the "Secretary's view that public employers are not so differently situated with regard to disciplining their employees as to require wholesale revision of [this] time-tested rule . . ." 519 U.S. at 458. Similarly, in *Auer*, this Court rejected the argument that the Department of Labor should have conducted rule-making on the disciplinary part of the salary basis test. 519 U.S. at 458-59.

Moreover, the petitioners would have this Court believe that local governments throughout the country are facing the possibility of massive overtime liability. There is nothing in the record to substantiate this statement. Like petitioners, who changed their rules in 1993, most local government have long since changed their disciplinary rules, or have had ample time to make such changes, to limit their liability.

Finally, the horrors referred to by petitioners (page 14 of the petition) have simply not taken place. The managers did not become hourly employees so there has been no overtime costs for managers since 1993. Nor is there anything in the record to support the petitioners' claims about

the difficulty of administering the new disciplinary rules. Like private employers, and all the other public employers that have learned to live with the Fair Labor Standards Act, petitioners can still take a variety of disciplinary actions against those managers who engage in misconduct, such as a reprimand, suspensions in weekly increments or demotions.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO FINAL JUDGMENT BELOW; THE PETITION IS PREMATURE

The Court of Appeals remanded this case to the district court "for proceedings not inconsistent" with the opinion. 229 F.3d at 133. Those proceedings will require consideration of various factors listed by the Court in making the factual determination as to whether the petitioners engaged in an actual practice of making impermissible disciplinary deductions. If the district court determines that there is no actual practice, petitioners win. On the other hand, if the district court determines that there is an actual practice, it will determine whether or not the window of correction is available.[1]

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1. Given the statement of the Court of Appeals that the window of correction is not available where there is an actual practice (*Yourman*, 229 F.3d at 129, citing *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000) and the Secretary of Labor's interpretation), the district court presumably would find that the window of correction is not available. That would be the proper time for the City to seek a Writ of Certiorari, if it could show a conflict in the circuit courts. (*See* Point III, below).

Ordinarily, this Court will not grant Certiorari where there has been a remand and no final judgment of the lower court. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967). *See generally* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 4.18, pp. 195-198 (7th Ed. 1993).

II.

THE QUESTION OF VIOLATION OF THE TENTH AMENDMENT IS NOT PROPERLY BEFORE THIS COURT

The petitioners ask this Court to determine whether the application of the salary basis test to local government employees violates the Tenth Amendment. That issue was not raised to or decided by the Court of Appeals in its opinion.[2]

In its brief to the Court of Appeals, the petitioners stated, in their jurisdictional statement, that "it is the defendants position that plaintiffs' claims are precluded by the Tenth Amendment . . . and defendants have preserved that claim, to raise if necessary in the appropriate forum." (Appellees' brief to the Court of Appeals, p. 2). Nothing further was argued concerning the Tenth Amendment and the Court of Appeals did not address the issue.

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2. The issue was argued and decided in an earlier appeal in this matter. 84 F.3d 655 (2d Cir. 1996) and presented to this Court in petitioners' previous petition for a writ of *certiorari*, 519 U.S. 1145 (1997). This Court did not decide the Tenth Amendment issue but vacated the judgment and remanded it to the lower court in the light of *Auer*.

It is submitted that a party does not "preserve" an issue simply by stating that the issue is preserved. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. Kress*, 398 U.S. 144, 147 n.2 (1970); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). *See also Auer*, 519 U.S. at 464; Stern, et al., *op. cit.*, p. 344.

III.

THERE IS NO REAL CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS

Petitioners argue that *Auer* left undecided whether the window of correction was available to an employer who was found to have an actual practice of docking pay and that there have been conflicting determinations on this issue by the circuit courts.

While the *Auer* court did not need to decide this issue, it said enough to indicate that the window may not be available where there is an actual practice of impermissible deductions. 519 U.S. at 463. No circuit court, post-*Auer*, upon finding an actual practice of making impermissible deductions, has ruled otherwise. Furthermore, the Secretary of Labor has stated in *amicus* briefs filed in the Second (*Yourman*), Sixth (*Tackacs v. Hahn Automotive Corp.*, No. 99-4431), Seventh (*Whetsel v. Network Property Services, LLC*, No. 00-2798) and Ninth (*Klem*) Circuits, that the window of correction is not open where there is an actual practice of making improper disciplinary deductions.

In *Auer*, this Court noted that the "salary basis test is a creature of the Secretary's own regulations" and the Secretary's interpretation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer*, at 461.

The window of correction is contained in the Secretary's regulations at 29 C.F.R. § 541.118(a)(6) (2000). It is interpreted by the Secretary as not being available if an employer engages in a practice of making impermissible deductions. *Yourman*, 229 F.3d at 130; *Klem*, 208 F.3d at 1091. Conversely, when there is no actual practice, like in *Auer*, the window of correction remains open.[3]

None of the post-*Auer* circuit court cases to which petitioners refer involved a pattern or practice of improper deductions. To the extent that those cases address the question of whether the window of correction is available to cure an employer's actual practice of improper disciplinary suspensions, they do so in *dicta*. Significantly, the Secretary of Labor did not file briefs in those cases; nor do those circuit courts address the Secretary of Labor's interpretation of her own window of correction rule.

CONCLUSION

For the above reasons, the Petition should be denied.

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3. To interpret the rule otherwise would allow an employer to treat its employees as exempt for overtime purposes while, at the same time, intentionally failing to comply with the "salary basis" rule. In the event that its employees sued for overtime pay, such an employer simply could use the window of correction to comply retroactively with the salary basis requirements. According to the Secretary, such a result would render the "salary basis" rule "essentially meaningless" and run counter to the rule that FLSA exemptions are to be construed narrowly.

Klem, 208 F.3d at 1092; *Yourman*, 229 F.3d at 130.

Respectfully submitted,

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